TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]. 1914

No. [redacted]251

UNITED STATES OF AMERICA, APPELLANT,

vs.

H. U. BARTLETT AND THEO. G. LASHLEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 21, 1913.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 686.

UNITED STATES OF AMERICA, APPELLANT,

vs.

H. U. BARTLETT AND THEO. G. LASHLEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX

	Original.	Print.
Caption	a	1
Transcript from the District Court of the United States for the Eastern District of Oklahoma	1	1
Bill of complaint	1	1
Demurrer to bill of complaint	7	6
Final decree	8	7
Assignment of errors	11	10
Petition for allowance of appeal	14	12
Order allowing appeal	14	12
Bond on appeal	14	12
Election as to printing record, with acknowledgment of service	15	13
Præcipe for transcript, with acknowledgment of service	15	13
Certificate of clerk	17	14
Appearance of counsel for appellants	18	14
Appearance of counsel for appellee	18	14
Order of submission	18	15
Opinion	19	15
Decree	23	18
Petition for and order allowing appeals to Supreme Court of United States	23	18
Assignment of errors on appeal to Supreme Court of United States	24	19
Citation and acknowledgment of service	27	20
Clerk's certificate to transcript	29	21
Stipulation as to value	30	21

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the December term, 1912, of said court, before the Honorable Walter H. Sanborn, circuit judge, and the Honorable William H. Munger and the Honorable Jacob Trieber, district judges.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-sixth day of August, A. D. 1912, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein H. U. Bartlett and Theo. G. Lashley are appellants and the United States of America is appellee, which said transcript as prepared, printed, and certified by the clerk of said district court in pursuance of an act of Congress approved February 13, 1911, is in the words and figures following, to wit:

1 In the United States District Court, Eastern District of Oklahoma.

Pleas and proceedings in the District Court of the United States for the Eastern District of Oklahoma before the Honorable Ralph E. Campbell, judge of the District Court for the Eastern District of Oklahoma, in the following entitled cases:

United States of America, complainant, No. 1849, Equity,
vs.
H. U. Bartlett and Theo. G. Lashley, defendants.

H. U. Bartlett and Theo. G. Lashley, appellants,
vs.
United States of America, appellee.

In the United States District Court for the Eastern District of Oklahoma.—United States of America, complainant, *v.* H. U. Bartlett and Theo. G. Lashley, defendants.

BILL IN EQUITY.

To the Honorable Circuit Judges of the United States for the Eastern District of Oklahoma:

The United States of America, by William J. Gregg, United States attorney for the eastern district of Oklahoma, for and by direction of the Honorable George W. Wickersham, Attorney General
2 of the United States, brings this bill upon request of the Hon-

orable William L. Fisher, Secretary of the Interior of the United States, against the defendants, H. U. Bartlett and Theo. G. Lashley, who are residents of Mannford, in Creek County, in the State of Oklahoma, residing within the eastern judicial district of said State and within the jurisdiction of this court, and thereupon your orator complains and says:

I.

That complainant herein, by reason of the helpless and dependent character of the Indian tribes and nations within its borders, and more particularly the Creek Tribe or Nation of Indians and the several members thereof, at all times past, through the public acts and declarations of the Congress of the United States, has and now does declare its relations as guardian of said Indian tribes and the individual members thereof, and at all times passed has, and still does, exercise exclusive dominion over and control of the property of the said tribes of Indians and the several members thereof, and more particularly the Creek Tribe or Nation of Indians and the several members thereof, by virtue of which there is imposed upon your orator the duty to do whatever may be necessary to be done for the guidance and protection of said Creek Tribe or Nation of Indians and the individual members thereof, and that said policy has always been and now is recognized by the United States as a sovereign power; that said tribe of Indians is now under the care of an Indian agent duly appointed under the laws of the Congress of the United States, and that the Congress of the United States still appropriates large sums of money for the benefit and protection of said Creek Tribe or Nation of Indians and the individual members thereof and for the maintenance of schools for the education of members of said tribe; that the Government of the United States, under and by virtue of the laws of the Congress of the United States, still has a large sum of money in its possession belonging to said tribe of Indians, and there still remains unallotted a large area of the tribal lands, the common property of the Creek Tribe or Nation of Indians; that the tribal relation or organization of the Creek Tribe or Nation of Indians still exists and is recognized by complainant in its dealings with said tribe or nation of Indians and the individual members thereof.

II.

3 Your orator further shows that on or about the 30th day of June, 1902, one Moses Wiley, who had been theretofore duly enrolled as a member and citizen of the Creek Tribe or Nation of Indians of the three-quarter blood, his name being placed opposite Roll No. 7683 of the approved rolls of said tribe, selected and there was thereupon duly allotted to him as his allotment and distributive share of the public lands of said Creek Tribe or Nation of Indians, otherwise than homestead, the following-described lands, to wit:

"The east half of the southeast quarter and the southwest quarter of the southeast quarter of section 9 in township 17 north and range 7 east, containing 120 acres, more or less."

and that thereafter and on the 10th day of March, 1903, a patent evidencing title to the foregoing lands was duly executed by P. Porter, principal chief of the Creek Nation, and afterwards on the 29th day of March, 1903, approved by Ethan A. Hitchcock, Secretary of the Interior, said patent evidencing title to said lands in said Moses Wiley. That the above and foregoing described lands are now open and unoccupied.

That by the terms and provisions of an act of Congress, approved May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," the aforesaid lands, which had theretofore been allotted as aforesaid to Moses Wiley, were encumbered with a restriction against their alienation or sale in any manner by said Moses Wiley prior to April 26, 1931, without the consent of the Secretary of the Interior of the United States, said section being as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including
4 minors of such degree of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three, inclusive, of an act entitled 'An act to grant the right of way through Oklahoma

Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes,' approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma."

That the deeds sought to be canceled by this bill were made and entered into by Moses Wiley, a three-quarters blood Creek citizen and allottee, at a time when said lands were inalienable by said allottee under and by virtue of the terms and provisions of the aforesaid act of Congress, and complainant brings and prosecutes this bill in its own behalf and on behalf of Moses Wiley, a duly enrolled citizen and member of the Creek Tribe or Nation of Indians of the three-quarter blood.

III.

That on, to wit, the 26th day of January, 1912, said Moses Wiley and Matilda Wiley, his wife, executed their certain purported warranty deed wherein and by the terms of which said Moses Wiley and Matilda Wiley, his wife, undertook to convey the lands heretofore described to the defendant, H. U. Bartlett, which said deed was filed for record in the office of the register of deeds of Creek County, in the State of Oklahoma, on the 30th day of January, 1912, at 8.30 o'clock a. m., and duly recorded in book 71 at page 439 of the records in said office.

Your orator further alleges that said warranty deed as aforesaid is void and of no force and effect as an instrument of conveyance of said land or any part thereof and vested no right, title, or interest in said lands in said H. U. Bartlett, for the reason that at the time of the execution of said deed said Moses Wiley was wholly without any power or capacity to make any valid alienation of said lands or of any interest therein by reason of the aforesaid public acts of Congress, and should be cancelled, annulled, set aside, and held for naught; that said deed as aforesaid and the recording thereof in the office of the register of deeds of Creek County, Oklahoma, constitutes a cloud upon the title to said lands in said Moses Wiley and by reason thereof this complainant has been hindered and prevented in the discharge of its full duty as trustee of said land and has been prevented from fully executing and carrying out its trust in relation thereto to the benefit of the said Moses Wiley, the allottee as aforesaid.

IV.

That on or about the 29th day of January, 1912, the defendant H. U. Bartlett and Maud Bartlett, his wife, executed and delivered their certain purported quitclaim deed to the defendant, Theo. G. Lashley, which said deed was duly filed for record on the 30th day

of January, A. D. 1912, at 8:30 o'clock a. m., in the office of the register of deeds of Creek County, State of Oklahoma, and duly recorded in book_____, at page _____ of said record.

That said quitclaim deed is wholly void and of no force and effect as an instrument of conveyance of said lands or any interest therein, for the reason that at the time of the execution of the same the said defendant H. U. Bartlett and Maud Bartlett, his wife, possessed no right, title, or interest whatsoever in and to said lands sought to be conveyed by said quitclaim deed; that the execution, delivery, and recording of said deed as aforesaid constitutes a cloud upon the title to said land in said Moses Wiley and complainant herein is hindered and delayed and prevented in the discharge of its full duty as trustee of said land and has been prevented from fully executing and carrying out the trust in relation to the benefits of the said Moses Wiley, allottee as aforesaid, and said deed should be cancelled, annulled, set aside, and held for naught.

6 That each of the deeds attempted to convey the same tract of land, the same being that portion of the allotted lands of Moses Wiley other than homestead, and that each were taken under like and similar conditions and the same principles of law and the same facts apply to each transaction; that the nature of the relief sought by complainant in each contention is the same and were each taken against the right and interest of complainant as trustee and guardian of the lands and property of the said allottee and complainant is entitled to the same relief in each transaction; that these several transactions are herein set forth in complainant's bill for the purpose of avoiding a multiplicity of suits similar in character.

For in as much as your orator has no adequate and complete remedy at law and can have no adequate relief except by this court, to the end, therefore, that the defendants may, if they show cause why your orator can not have the relief prayed for, your orator prays that it have the most gracious writ of subpoena issued and directed against said defendants, commanding them and each of them at a date certain and under certain penalties to personally be and appear before the court and to make a full disclosure and discovery of all matters set out and stated and referred to in the aforesaid bill according to the best of their knowledge, information, remembrance, and belief, and that they true, direct, and perfect answers make to the matters hereinbefore stated and charged, but not under oath, answers under oath being hereby expressly waived.

Your orator further prays that upon the final hearing of this cause this honorable court, by its decree, shall adjudge and decree the several transactions set out, referred to, and described as above in this bill and the several deeds which were executed and delivered by the said Moses Wiley and by the said H. U. Bartlett covering the portion of the allotment of the said Moses Wiley described in said deeds be adjudged and decreed to be void and of no binding force and effect as against complainant or as against the said Moses Wiley, allottee

as aforesaid, and that the said deeds and each of them be cancelled, annulled, set aside, and held for naught, and that the said defendants H. U. Bartlett and Theo. G. Lashley, and all persons claiming by, through, or under them or either of them, be adjudged to take nothing by virtue of said conveyances, or either of them, as against complainant or as against the said Moses Wiley, allottee as
7 aforesaid, and that complainant have such other and further relief as in equity and good conscience shall seem proper.

WILLIAM J. GREGG,
United States Attorney.
By JOHN B. MESERVE,
Assistant United States Attorney.

(Endorsed:) Filed August 10th, 1912. R. P. Harrison, clerk.

And thereafter, to wit, on the 14th day of August, 1912, the defendant filed demurrer to the bill of complaint herein, which demurrer is in words and figures as follows, to wit:

THE JOINT AND SEVERAL DEMURRERS OF H. U. BARTLETT AND THEO. G. LASHLEY TO THE BILL OF COMPLAINT.

Come now the defendants, H. U. Bartlett and Theo. G. Lashley, through their solicitors, Geo. S. Ramsey & C. L. Thomas, and not confessing nor acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill of complaint and say that the same does not state any matter of equity entitling the complainant to the relief prayed for, nor are the facts as stated in said bill of complaint sufficient to entitle complainant to any relief against these defendants or either of them.

Wherefore, the defendants pray judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray that they be dismissed with their reasonable costs in this behalf sustained.

GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for Defendants.

We, Geo. S. Ramsey and C. L. Thomas, solicitors for the defendants in the above, do hereby certify that the foregoing demurrer, in our opinion, is well founded in law.

GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for Defendants.

STATE OF OKLAHOMA, *Creek County, ss:*

We, H. U. Bartlett and Theo. G. Lashley, defendants
8 in the above cause, being first duly sworn, do say that the foregoing demurrer is not interposed for delay.

H. U. BARTLETT.
THEO. G. LASHLEY.

Subscribed and sworn to before me this 10th day of August, 1912.

[SEAL.] HARRY E. WHITEHEAD,
Notary Public.

My commission expires May 2nd, 1915.

(Endorsed:) Filed August 14, 1912. R. P. Harrison, clerk.

And thereafter, to wit, on the 14th day of August, A. D. 1912, the following decree was entered of record in said court, to wit:

FINAL DECREE.

Now, on this 14th day of August, A. D. 1912, the same being one of the regular days of the McAlester 1912 term of this court, this cause came on for hearing by assignment and agreement of the parties upon complainant's bill and the demurrer heretofore filed to said bill by the defendants, H. U. Bartlett and Theo. G. Lashley, the complainant appearing by John B. Meserve, assistant United States attorney, and the defendants, H. U. Bartlett and Theo. G. Lashley, appearing by Clarence L. Thomas, their solicitor.

And the court, after hearing the argument upon the demurrer of the defendants and upon due consideration of the same, finds that said demurrer should be overruled, to which finding of the court the defendants, H. U. Bartlett and Theo. G. Lashley, then and there duly excepted, which exception is by the court allowed.

Whereupon it is considered, ordered, and adjudged by the court that the demurrer of defendants, H. U. Bartlett and Theo. G. Lashley, heretofore interposed to complainant's bill herein be, and the same is hereby, overruled, to which judgment of the court the defendants, H. U. Bartlett and Theo. G. Lashley, then and there duly excepted, which exception was by the court allowed.

And thereafter the said defendants, H. U. Bartlett and Theo. G. Lashley, in open court declined and refused to plead further to complainant's bill and then and there elected to stand upon their said demurrer.

9 Whereupon, upon motion of complainant herein, the court doth find that judgment should be rendered in this court in favor of complainant for the cancellation of certain deeds set forth in complainant's bill, to which findings the defendants then and there duly excepted, which said exception was allowed by the court.

And the court finds that the complainant, the United States of America, under the allegations of the bill filed herein, is entitled to maintain this suit and to recover such relief as the facts warrant, to

which finding the defendants excepted, which exceptions are allowed by the court.

And the court finds that the lands involved herein, to wit, the east half of the southeast quarter and the southwest quarter of the southeast quarter of section 9, township 17 north, range 7 east, containing 120 acres, more or less, was on the 30th day of June, 1902, duly allotted and set aside to one Moses Wiley as and for his allotment, otherwise than homestead, from the public lands of the Creek Tribe or Nation of Indians; that said Moses Wiley was on said 30th day of June, 1902, and has been at all times since a duly enrolled member or citizen of the Creek Tribe or Nation of Indians of the three-quarter blood, being enrolled opposite roll No. 7683 of the approved rolls of said tribe.

The court finds that on the 26th day of January, 1912, the said Moses Wiley and Matilda Wiley, his wife, executed their purported warranty deed by the terms of which they undertook to convey the lands heretofore described to the defendant, H. U. Bartlett, which said deed was filed for record in the office of the register of deeds of Creek County, in the State of Oklahoma, on the 30th day of January, 1912, at 8.30 o'clock a. m., and duly recorded in book 71 at page 439 of the records of said office.

The court finds that said warranty deed as aforesaid is void and of no force and effect and conveys no right, title, or interest in said land or in any portion thereof to the said defendant, H. U. Bartlett, and that the same should be cancelled, annulled, set aside, and held for naught, to which said finding of the court the defendants herein duly excepted, which exceptions were by the court allowed.

The court finds that the execution of said deed as aforesaid and the recording thereof in the office of the register of deeds of Creek County, Oklahoma, constitutes a cloud upon the title to said land in said Moses Wiley, and that by reason thereof complainant herein has been hindered and prevented in the discharge of its full duty as trustee of said land and has been prevented from fully executing and carrying out its trust in relation thereto to the benefit of the said Moses Wiley, to which finding the defendant duly excepted, which exceptions were allowed by the court.

The court further finds that on the 29th day of January, 1912, the defendant, H. U. Bartlett, and Maud Bartlett, his wife, executed and delivered their certain purported quitclaim deed purporting to convey the lands heretofore described to the defendant, Theo. G. Lashley, which said deed was duly filed for record in the office of the register of deeds of Creek County, Oklahoma, on the 30th day of January, A. D. 1912, at 8.30 o'clock a. m., and duly recorded in book_____ at page_____ of said record.

The court finds that said quitclaim deed is wholly void and of no force and effect and conveys no right, title, or interest in and to the lands in controversy herein, for the reason that at the time of the execution of the same the said defendant, H. U. Bartlett, and Maud Bartlett, his wife, possessed no right, title, or interest whatsoever in

said land, to which finding of the court the defendants herein duly excepted, which exception was by the court allowed.

The court finds that the execution, delivery, and recording of said deed as aforesaid constitutes a cloud upon the land in said Moses Wiley and complainant herein is hindered and delayed and prevented in the discharge of its full duty as trustee of said land and has been prevented from fully executing and carrying out the trust in relation to the benefits of the said Moses Wiley, to which finding the defendants excepted, which exceptions were allowed by the court.

And the court finds that said deed, by reason thereof, should be cancelled, annulled, set aside, and held for naught, to which finding of the court the defendants herein duly excepted, which exceptions were by the court duly allowed.

Wherefore it is considered, ordered, and adjudged by the court that complainant have and recover judgment against the defendants, H. U. Bartlett and Theo. S. Lashley, adjudging and decreeing the cancellation of the certain deeds heretofore described herein, and adjudging and decreeing that the said defendants, and each of them, and all persons claiming by, through, or under them, or either of them, take no right, title, interest, or estate in or to any of the
11 lands described in said deeds, and that the title to said land and the right of possession thereto be and the same is hereby adjudged to be in Moses Wiley as against the defendants herein, and that any cloud cast upon the title to said land by reason of the execution, delivery, and recording of said deeds be, and the same is hereby, removed, to which judgment of the court the defendants, H. U. Bartlett and Theo. G. Lashley, then and there duly excepted, which exception was by the court allowed.

It is further ordered and adjudged by the court that the complainant have and recover judgment against the defendants, H. U. Bartlett and Theo. G. Lashley, and each of them, for its necessary and proper costs in this behalf expended, taxed by the clerk of this court at $------, to all of which the defendants then and there duly excepted, which exception was by the court allowed, to all of which action, order, finding, ruling, and decision of the court the defendants excepted, which exceptions were allowed by the court.

And thereupon the defendants in open court prayed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and moved the court to allow a supersedeas of its judgment rendered herein, upon the execution of a proper bond, which application was by the court allowed.

And it is therefore ordered that said appeal be, and the same is hereby, allowed in open court, and the appeal and supersedeas bond in the sum of five hundred dollars ($500.00) to be filed herein conditioned and approved as required by law.

RALPH E. CAMPBELL, *Judge*.

(Endorsed:) Filed August 14, 1912, R. P. Harrison, Clerk.

And thereafter, to wit, on the 14th day of August, 1912, the defendants filed assignment of errors, petition for allowance of appeal,

which petition for allowance of appeal was granted by the court. Said assignment of errors, petition for allowance of appeal, and order allowing same are in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Come now the defendants in the above-entitled cause by their solicitors, Geo. S. Ramsey & C. L. Thomas, and file the following assignment of errors upon which they will rely for grounds
12 of reversal in their appeal in the final order and decree of this court entered herein on the 14th day of August, 1912. The court erred—

First.

In overruling the demurrer of these defendants to the bill of complaint of complainant herein.

Second.

In not sustaining the demurrer of the defendants to the bill of complaint of the complainant herein.

Third.

In rendering its judgment and decree herein in favor of the complainant and against the defendants.

Fourth.

The court erred in finding that the warranty deed executed January 26th, 1912, by Moses Wiley and Matilda Wiley, his wife, to H. U. Bartlett, covering the lands in controversy is void and of no force and effect and conveys no right, title, or interest in said land nor any portion thereof to the said defendant, H. U. Bartlett, and that the same should be cancelled, annulled, and held for naught.

Fifth.

The court erred in finding the warranty deed executed by Moses Wiley and Matilda Wiley, his wife, to H. U. Bartlett constitutes a cloud upon the title to said land in said Moses Wiley.

Sixth.

The court erred in finding that the quitclaim deed covering the lands in controversy and executed January 29, 1912, by the defendant, H. U. Bartlett, and Maude Bartlett, his wife, to the defendant, Theo. G. Lashley, is wholly void and of no effect, and conveys no right, title, or interest in and to the lands in controversy herein.

Seventh.

The court erred in finding that the execution and delivery of said quitclaim deed by H. U. Bartlett and Maude Bartlett, his wife, to the defendant, Theo. G. Lashley, constitutes a cloud upon the title to said land in said Moses Wiley.

13 Eighth.

The court erred in finding that the said deed executed by H. U. Bartlett and Maude Bartlett, his wife, to Theo. G. Lashley, should be cancelled, annulled, set aside, and held for naught.

Ninth.

The court erred in ordering and adjudging that the complainant have and recover judgment against the defendants, H. U. Bartlett and Theo. G. Lashley, adjudging and decreeing the cancellation of the said deed executed by Moses Wiley and Matilda Wiley, his wife, to H. U. Bartlett, and the said deed executed by H. U. Bartlett and Maude Bartlett, his wife, to the defendant, Theo. G. Lashley, and adjudging and decreeing that said defendants, and each of them, and all persons claiming by, through, or under them, or either of them, take no right, title, interest, or estate in or to any of the lands involved herein.

Tenth.

The court erred in ordering and adjudging that the title to the land involved herein and the right of possession thereto be in Moses Wiley as against the defendants herein, and that any cloud cast upon the title to said land by reason of the execution, delivery, and recording of said deeds be removed.

Eleventh.

The court erred in ordering and adjudging that the complainant have and recover judgment against the defendants for the costs herein.

Twelfth.

The court erred in finding that the complainant was entitled to maintain this suit and recover the relief prayed for.

Wherefore defendants pray that said decree be reversed and that the Circuit Court of Appeals for the Eighth Circuit render a proper decree on the record.

GEO. S. RAMSEY.
C. L. THOMAS.
Solicitors for Defendant.

(Endorsed:) Filed August 14, 1912. R. P. Harrison, clerk.

14 PETITION FOR ALLOWANCE OF APPEAL WITH SUPERSEDAS.

To the Honorable Ralph E. Campbell, Judge of said Court:

The above-named defendants, feeling themselves aggrieved by the decree made and entered in this cause on the 14th day of August, 1912, do hereby in open court appeal from said decree and order to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed, and that a transcript of the records, proceedings, and papers upon which said decree and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, and desiring to supersede the execution of the said decree and order, these petitioners here tender bond in such amount as the court may require for such purpose and pray that with the allowance of said appeal supersedas be issued.

GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for Defendants.

The foregoing petition is granted and the appeal allowed in open court and shall operate as a supersedas of the decree of this court herein upon the defendants filing a bond herein in the sum of five hundred dollars ($500.00), with sufficient surety, to be conditioned and approved as required by law.

Done this 14th day of August, 1912.

RALPH E. CAMPBELL, *Judge.*

(Endorsed:) Filed August 14, 1912. R. P. Harrison, clerk.

BOND ON APPEAL.

Know all men by these presents:

That we, H. U. Bartlett and Theo. G. Lashley, as principals, and W. D. Hinton, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee in the above cause, in the sum of five hundred dollars ($500.00), conditioned that,

Whereas on the 14th day of August, 1912, in the United States District Court for the Eastern District of Oklahoma, in a suit depending in that court wherein the United States of America was com-
15 plainant and H. U. Bartlett and Theo. G. Lashley were defendants, a decree was rendered against the said H. U. Bartlett and Theo. G. Lashley, and the said H. U. Bartlett and Theo. G. Lashley having obtained and had allowed in open court an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the office of the clerk of the court to reverse said decree,

Now, if the said H. U. Bartlett and Theo. G. Lashley shall prosecute their appeal to effect and answer all damages and costs if they

fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

H. U. BARTLETT,
THEO. G. LASHLEY,
Principals.
W. D. HINTON, *Surety.*

Approved this 14th day of August, 1912.

RALPH E. CAMPBELL, *Judge.*

(Endorsed:) Filed August 14, 1912, R. P. Harrison, Clerk.

ELECTION AS TO PRINTING RECORD.

The appellants herein, H. U. Bartlett and Theo. G. Lashley, elect to have the transcript of the record in the above cause printed under the supervision of the clerk of the United States District Court for the Eastern District of Oklahoma, and respectfully request that said transcript in this cause be printed as required by law under this election.

GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for Defendants.

Service of the above election as to printing record is acknowledged this 15th day of August, 1912.

JOHN B. MESERVE,
Solicitor for Appellee.

(Endorsed:) Filed August 15, 1912, R. P. Harrison, Clerk.

PRAECIPE.

To the Honorable R. P. Harrison, Clerk of the Above-Named Court:

You are requested to make a transcript of the record in the
16 above entitled cause, to be printed and filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to appeal allowed in said cause, to include in such transcript of record the following, and no other papers or exhibits:

(1) Bill of complaint.

(2) Joint and several demurrers of H. U. Bartlett and Theo. G. Lashley to the bill of complaint.

(3) Final decree.

(4) Petition for allowance of appeal and supersedeas and order allowing appeal and supersedeas.

(5) Assignment of error.

(6) Bond on appeal.

(7) Election as to printing record.

(8) Praecipe for transcript.

GEO S. RAMSEY,
C. L. THOMAS,
Solicitors for Defendants,
H. U. Bartlett and Theo. G. Lashley.

We, the undersigned solicitors for the complainant, United States of America, do hereby acknowledge receipt of the above designation of parts of the record necessary for the consideration of the errors assigned by the defendants, and waive the designation of any further part or parts of the record, and agree that the above includes all of the portions of said record material or necessary for the consideration of the errors assigned by defendants.

Dated this 15th day of August, 1912.

WM. J. GREGG,
JOHN B. MESERVE,
Solicitors for Complainant, United States of America.

(Endorsed:) Filed August 15, 1912, R. P. Harrison, Clerk.

17 CERTIFICATE OF CLERK.

UNITED STATES OF AMERICA, *Eastern District of Oklahoma, ss:*

I, R. P. Harrison, clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true, and correct transcript of so much of the record in the case of United States of America v. H. U. Bartlett et al., No. 1849, as required by the praecipe of counsel filed in this cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Muskogee, Oklahoma, this 20th day of August, A. D. 1912.

[SEAL.]

R. P. HARRISON, *Clerk.*
By H. E. BOUDINOT, *Deputy.*

18 And thereupon, after the filing of the transcript in said United States Circuit Court of Appeals for the Eighth Circuit in cause No. 3839, wherein H. U. Bartlett and Theo. G. Lashley are appellants and the United States of America is appellee, the following proceedings were had in said Circuit Court of Appeals, to wit:

APPEARANCE OF COUNSEL FOR APPELLANTS.

The clerk will enter my appearance as counsel for the appellants.

GEO. S. RAMSEY.
C. L. THOMAS.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 28, 1912.

APPEARANCE OF COUNSEL FOR APPELLEE.

To the clerk of the above-named court:

Please enter my appearance as solicitor of record for appellee in this cause.

Dated this 26th day of August, 1912.

JOHN B. MESERVE,
Assistant United States Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals Aug. 28, 1912.

ORDER OF SUBMISSION, JANUARY 7, 1913.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. L. Thomas for appellants, continued by Mr. John B. Meserve for appellee, and concluded by Mr. George S. Ramsey for appellants.

Thereupon this cause was submitted to the court on the transcript of record from said district court and the briefs of counsel filed herein.

19 United States Circuit Court of Appeals, Eighth Circuit. No. 3839.—December Term, A. D. 1912.

H. U. BARTLETT AND THEO. G. LASHLEY appellants, *vs.* UNITED STATES OF AMERICA, APPELLEE.	Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. George S. Ramsey and Mr. C. L. Thomas for appellant.

Mr. John B. Meserve, assistant United States attorney (Mr. William J. Gregg, United States attorney, on brief), for appellee.

Before Sanborn, circuit judge, and Wm. H. Munger and Trieber, district judges.

Wm. H. Munger, district judge, delivered the opinion of the court.

From the facts in this case it appears that one Moses Wiley, a duly enrolled three-quarters blood Indian, was, on the 30th day of June, 1902, allotted one hundred and sixty acres of land, forty acres of which was selected as a homestead. The remaining one hundred and twenty acres of said allotment, not being a part of his homestead, is the land involved in this case. The patent to the land was issued to Wiley on March 10, 1903. On January 26, 1912, nearly nine years after the patent, Wiley and his wife conveyed the one hundred and twenty acres, being his allotment other than the homestead, to one H. U. Bartlett, which deed was filed for record in the office of the register of deeds of Creek County, in the State of Oklahoma, on the 30th day of January, 1912, and duly recorded; that on the 29th day of January, 1912, H. U. Bartlett and wife conveyed said lands by quitclaim deed to Theo. G. Lashley, which deed was, on the 30th day of January, 1912, filed for record in the office of the register of deeds of Creek County, Oklahoma, and duly recorded.

20 On August 10, 1912, the United States filed its bill in equity in the United States District Court for the Eastern District of Oklahoma, seeking to have the said deeds from Moses Wiley and wife to H. U. Bartlett and from H. U. Bartlett and wife to Theo. G. Lashley cancelled, annulled, and set aside and the title quieted to said lands in Moses Wiley. Appellants filed a demurrer to the bill, which was overruled, and, appellants electing to stand upon their demurrer, a decree was entered as prayed in the bill, from which appellants prosecute this appeal.

Counsel for the Government in their brief concede that under the terms of the act of Congress under which the allotment was made to said Moses Wiley the lands in question were impressed with a five-year period of restriction against alienation; that said five-year restricted period expired by limitation on the 8th day of August, 1907; that these lands were free from restrictions for the period of time intervening between the 8th day of August, 1907, and the 27th day of July, 1908; they claim that on the 27th day of May, 1908, Congress passed an act reimposing restrictions against the alienation of this land by said Moses Wiley, and they say: "The single issue presented by this appeal and the sole question before the court for its determination is as to whether or no the surplus allotment of a Creek Indian of the three-quarter blood was alienable by the allottee on and after the 27th day of July, 1908." The lands in question were allotted to Moses Wiley under an act of Congress of June 30, 1902 (32 Stat. at L., 500). So much of that act as is applicable to the consideration of the question before us is found in section 16 of the act, and the applicable portion reads as follows:

"16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land; or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

From this it clearly appears that the restriction upon the lands in question were limited to the period of five years from the date of the approval of the supplemental agreement. It is claimed by the Government under act of May 27, 1908, a restriction against alienation was reimposed. So much of the act of May 27, 1908, found in 35 Statutes at Large, 312, as is applicable here is found in the first section, as follows:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees
21 of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: * * * and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as hereto-

fore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. * * *"

It is contended on the part of appellants that the foregoing act of May, 1908, is inapplicable, as it expressly provided that the act should not be construed as imposing restrictions removed from land by or under any law prior to the passage of that act; that as the restrictions in this case had expired prior to the passage of the act they came within the exception, for, as is argued, the restriction being imposed by an act of Congress, and limited to a period of five years, when that period expired the restriction was removed by the law which imposed it. It is unnecessary for us to pass upon the correctness of this statement, however, for we are of the opinion that it was not the intent nor within the power of Congress to reimpose a restriction upon the alienation of lands against which none at the time existed. True it is that the Supreme Court in Tiger v. Western Investment Company, 221 U. S., 286, held that it was within the power of Congress to continue or extend the period of restriction against alienation during the period of an existing restriction against alienation. The Supreme Court, however, in that case, expressly referred to the fact that the title to the allotment was still held by the United States in trust for the Indian; that while the land was held by the United States in trust for the Indian allottee it was competent for Congress to extend the trust period and prohibit alienation during such extended period. We find nothing in that case holding that, after the trust period had expired and both the legal and equitable title had fully vested in the allottee, such allottee being a citizen of the United States, Congress could thereafter reach out and withdraw the land from alienation and taxation by the State and local municipalities. As soon as the title, both legal and equitable, to the land in question became vested in Moses Wiley it was subject to taxation by the State and county authorities, and Moses Wiley had full dominion over the same, notwithstanding in many respects the Government still retained a guardianship over him.

Suppose, for instance, Moses Wiley had received title to land by inheritance from a white ancestor. Could it be said that because of the guardianship of the United States over him Congress
22 could deprive him of his full property rights in and to such land, and also withdraw the same from State or municipal taxation? It seems clear to us that it could not, and if not, we fail to see upon what principle it can be said it can draw to itself control over the alienation of land the title of which, both legal and equitable, it has conveyed to the Indian.

In Mullen v. United States, 224 U. S., 448, it was held that the United States, though retaining its guardianship over the Choctaw Indians, could not maintain an action to set aside conveyances made by Choctaw Indians to lands against the alienation of which no restriction was imposed.

The only case brought to our attention wherein it has been held that the Government, by virtue of its guardianship alone, could lawfully restrain an Indian from alienating lands to which he had the full title in fee, and in which the United States had no legal or equitable interest, is the case of United States v. Allen, 179 Fed., 13, in the opinion of which there is an expression to the effect that the Government may impose such restriction. The question, however, was not involved in that case, and the expression to that effect is mere obiter. The opinion in that case covered a number of cases, and was reviewed by the Supreme Court in 224 U. S., 415, under the title of Hickman v. United States, on page 448 under the title of Mullen v. United States, on page 458 under the title of Goat v. United States, and on page 471 under the title of Deming Investment Co. v. United States; and the judgment was reversed in so far as it held that the United States could maintain an action to set aside conveyances made to lands after the restriction had terminated.

We are of opinion that, as the restriction against alienation of the lands in question expired and the full title in fee vested in Moses Wiley prior to the passage of the act of May 27, 1908, the United States has no such interest in the lands as entitled it to maintain this action.

The judgment is therefore reversed and the cause remanded to the court below, with directions to sustain the demurrer and dismiss the bill.

Filed March 3, 1913.

23 DECREE OF U. S. CIRCUIT COURT OF APPEALS.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed, without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said district court with directions to sustain the demurrer and to dismiss the bill.

March 3, 1913.

PETITION FOR AND ORDER ALLOWING APPEAL TO SUPREME COURT, U. S.

Comes now the appellee by D. H. Linebaugh, United States attorney for the Eastern District of Oklahoma, by direction of the Honorable James T. McReynolds, Attorney General of the United States, and represents and shows to the court that the appellee, the United States of America, feels itself aggrieved by the order and judgment of this court made and entered in the above-entitled cause on the 3rd day of March, 1913, wherein this court reversed the judgment of the

District Court of the United States for the Eastern District of Oklahoma, from the judgment of which court the appellants prosecuted their appeal to this court; and appellee does hereby, in open court, pray an appeal from said order and judgment of this honorable court to the Supreme Court of the United States for the reasons
24 and upon the grounds specified in the assignment of errors filed herewith, and that a transcript of the record and the proceedings upon which said order and judgment is based, duly authenticated, may be sent to the Supreme Court of the United States by the clerk of this court; and your petitioner further prays that a proper order touching the security to be required of appellants, if any, and an order directing the clerk to send up the record in this case and perfect the appeal herein be duly made.

D. H. LINEBAUGH,
United States Attorney, Attorney for Appellee.

The above and foregoing appeal is allowed this 4th day of July, 1913.

WALTER H. SANBORN,
Presiding Judge, U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 5, 1913.

ASSIGNMENT OF ERRORS.

The United States now makes and files the following assignment of errors upon which it will rely in its appeal to be taken to the Supreme Court from the decree of this court made and entered on to-wit: March 3, 1913, reversing the decree of the District Court for the Eastern District of Oklahoma and remanding the cause to said court with directions to dismiss the bill, viz:

I. The court erred in reversing the decree of the District Court for the Eastern District of Oklahoma and in remanding this cause to that court with directions to dismiss the bill.

25 II. The court erred in holding and adjudging that the deed executed by Moses Wiley and Matilda Wiley, his wife, to H. U. Bartlett, January 26, 1912, was a valid and lawful deed and operated to convey title and interest in and to the lands in controversy in this suit.

III. The court erred in not holding and adjudging that the said deed last mentioned was wholly void and inoperative.

IV. The court erred in holding that the deed executed by the defendant, H. U. Bartlett, and Maud Bartlett, his wife, to Theo. G. Lashley, January 29, 1912, operated to convey the lands in controversy.

V. The court erred in not holding and adjudging the said last mentioned deed to be void and inoperative.

VI. The court erred in not holding and adjudging that the two deeds aforesaid were made in violation of the laws of the United States and constitute clouds upon the title of the land in contro-

versy, and in not adjudging the title to the said lands to be in the said Moses Wiley, allottee thereof, and in not directing that, for the purpose of removing the said clouds, the said deeds be cancelled, set aside, annulled, and held for naught.

VII. The court erred in not ordering and adjudging in this cause that the title to the land involved herein and the right of possession thereto be quieted as against the said defendants in the said Moses Wiley.

Wherefore the United States prays that the judgment and decree of the Circuit Court of Appeals for the Eighth Circuit, made and entered in this cause on to-wit: March 3, 1913, be reversed, and that a decree be directed by the Supreme Court in accordance with the prayer of the bill of complaint.

D. H. LINEBAUGH,
United States Attorney for the Eastern District of Oklahoma.

26 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 5, 1913.

27 CITATION.

United States of America to H. U. Bartlett and Theo. G. Lashley, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, this fourth day of July, A. D. 1913.

WALTER H. SANBORN,
Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Service of the above and foregoing citation upon us is acknowledged this 14th day of July, 1913.

GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for H. U. Bartlett and Theo. G. Lashley.

28 (Endorsed:) No. 3839. H. U. Bartlett and Theo. G. Lashley, appellants, vs. United States of America, appellee. Citation on appeal to Supreme Court, U. S. Filed July 17, 1913. John D. Jordan, clerk.

29 CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed, and certified by the clerk of said district court to the United States Circuit Court of Appeals in pursuance of the act of Congress approved February 13, 1911, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements, omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein H. U. Bartlett and Theo. G. Lashley are appellants and United States of America is appellee, No. 3839, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation, with acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

I do further certify that on the tenth day of May, A. D. 1913, a mandate was issued out of said Circuit Court of Appeals in said cause directed to the judges of the District Court of the United States for the Eastern District of Oklahoma.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-fourth day of July, A. D. 1913.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

30 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, APPELLANT,
vs. No. ———.
H. U. BARTLETT AND THEODORE G. LASHLEY, APPELLEES.

STIPULATION.

It is hereby stipulated by and between the parties to the above-styled cause, through their counsel of record, that the lands involved in this controversy are situated within Creek County, in the State of Oklahoma, and in the eastern judicial district thereof; that said lands are now contiguous to the oil and gas fields; that said lands are now being operated at the present time for gas and yield an

annual income of about three hundred ($300.00) dollars; that the value of said lands involved in this case is the sum of five thousand ($5,000) dollars, and that said lands were, at the commence-
31 ment of this suit, of a value in excess of one thousand ($1,000) dollars, exclusive of costs, and that the matter in controversy in this cause exceeds one thousand ($1,000) dollars, besides the costs.

Witness our hands and signatures at Muskogee, Oklahoma, this 9th day of August, 1913.

D. H. LINEBAUGH,
United States Attorney for the Eastern District of Oklahoma, Solicitor for Appellant.
GEO. S. RAMSEY,
C. L. THOMAS,
Solicitors for Appellees.

32 (Endorsed:) File No. 23837. U. S. Circuit Court Appeals, 8th Circuit. Term No. 686. United States of America, appellant, *vs.* H. U. Bartlett and Theo. G. Lashley. Filed August 21, 1913. File No. 23837.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT,
v.
H. U. BARTLETT AND THEO. G. LASHLEY. } No. 686.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this cause for hearing at an early day convenient to the court during the next term.

This is a proceeding in equity by the United States to set aside a deed executed by Moses Wiley, a three-quarter blood Creek Indian, conveying lands other than homestead, patented to him under the act of Congress approved June 30, 1902, 32 Stat. 500, to H. U. Bartlett, appellee; also, a deed from Bartlett to Theo. G. Lashley, appellee, conveying the same land to the latter, the United States basing its action on the ground that under the act of May 27, 1908, 35 Stat. 312, the land was made inalienable until 1931.

A demurrer to the bill was overruled and a decree was entered in the District Court in favor of the

United States, from which an appeal was taken to the Circuit Court of Appeals, where the action of the lower court was reversed and the cause remanded to the court below, with directions to sustain the demurrer and dismiss the bill, the court holding—

1. That the period of restriction on alienation fixed by the act of June 30, 1902, namely, five years, having expired and the full title in fee vested in Moses Wiley prior to the passage of the act of May 27, 1908, the United States had no such interest in the lands as entitled it to maintain this action.

2. That it was not the intent nor within the power of Congress to reimpose a restriction upon the alienation of lands against which at the time no restrictions existed.

The questions involved are of vital importance to the eastern half of the State of Oklahoma, and until a determination of the same is made by this court a great deal of similar litigation must be held in abeyance.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

MAY, 1914.

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INDEX.

Page.

STATEMENT 1

THE QUESTIONS PRESENTED 6

1. Whether Congress by the act of May 27, 1908, intended that the surplus allotments held by Creeks of three-fourths Indian blood should be made inalienable until April 26, 1931; and, if so 6

2. Whether Congress had the power to reimpose restrictions upon the alienation of such lands after the period of restriction imposed by a previous law had expired 7

ARGUMENT 7

1. By the act of May 27, 1908, Congress meant to provide against the alienation, prior to April 26, 1931, of any allotment then held by any member of any of the Five Civilized Tribes of full or three-quarters Indian blood, excepting only such allotments as had been or as might thereafter be specifically relieved of restrictions, by the action of the Secretary of the Interior or of Congress itself 7

   1. General statement of the reasons supporting this proposition 7

   2. The act of May 27, 1908, should be construed, *in pari materia* with other acts which will be cited, as the expression of a definite policy to abolish the divergencies and remedy the defects of the various agreements under which the allotments in the Five Civilized Tribes had been made, by classifying all the allotments, irrespective of tribe, according to the degree of the presumed natural competency of the allottees, standardized arbitrarily in accordance with their respective proportions of Indian blood; and by relieving the restraints altogether as to those thus classified as competent, and by forbidding conveyances by those thus classified as incompetent prior to April 26, 1931 11

      (*a*) Review of the provisions concerning alienation which antedated the beginning of this policy 11

      (*b*) Discussion of the later acts of Congress 17

      (*c*) Both the spirit and the letter of the act of May 27, 1908, demand that all the lands of the three-quarter blood Indians be held restricted until April 26, 1931, irrespective of the prior restrictions 23

ARGUMENT—Continued. Page.

3. That part of the first section of the act of May 27, 1908, which declares that the act shall not be construed "to impose restrictions removed from land by or under any law prior to the passage of this act," refers only to those cases in which restrictions have been removed by the direct action of Congress or by the Secretary of the Interior from particular allotments..... 29

(*a*) The opposite construction would render this clause repugnant to the plain terms classifying three-quarter bloods as incompetent in respect of all of their land and to the fundamental purpose of the statute to protect the incompetent Indians..... 30

(*b*) The clause may readily be construed in avoidance of this result and in harmony with the statute as a whole by confining it to the special cases above mentioned. 31

(*c*) If doubt exists, this construction should be adopted as the more beneficial to the Indians..... 32

II. Congress had power to place a new restriction upon the land in controversy, as was done by the act of May 27, 1908.... 33

1. The case is indistinguishable in principle from *Tiger* v. *Western Investment Co*..... 33

2. The imposition of restrictions upon the alienation of Indian allotments is but a mode of exercising the power of guardianship still residing in the United States respecting the Indians. Until the guardianship shall have been renounced, Congress may modify its plans and correct its mistakes. If it has given the Indians a liberty too large for their own good, Congress may curtail it. The renewal of an expired restriction stands upon the same ground as the extension of one which has still some time to run. The power to extend existing restrictions and the power to impose new restrictions where none exist—one and the same in quality and purpose—are derived from the guardianship of the Federal Government over the Indians. 36

3. The power to reimpose restrictions is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of any vested right of property. But the protection of his property is a legitimate and necessary exercise of the power of

ARGUMENT—Continued. Page.

guardianship, subject to which his property is held, and the imposition of a restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property..... 46

4. The power to protect the property of an Indian ward, being a power of the General Government, is not to be diminished or impaired in its full usefulness by the circumstance that the property has been tentatively subjected to the taxing power of a State, but the right of the State of Oklahoma to continue taxing the land in controversy is not involved, and could not constitute a defense in the present case..... 49

5. The power to reimpose restrictions is consistent with the full protection of all rights in the land which may have become vested in third persons while the allottee was free to convey..... 50

CONCLUSION..... 51

CITATIONS.

CASES.

Bartlett v. *United States*, 203 Fed., 410..... 2
Bowling v. *United States*, 233 U. S., 528..... 36
Choate v. *Trapp*, 224 U. S., 665..... 12, 47, 48
Deming Inv. Co. v. *United States*, 224 U. S., 473..... 12, 42, 43
Franklin v. *Lynch*, 233 U. S., 269..... 33
Goat v. *United States*, 224 U. S., 458..... 12, 14, 42, 43
Hallowell v. *United States*, 221 U. S., 317..... 36
Heckman v. *United States*, 224 U. S., 413..... 12, 14, 26, 36, 42
Heff, Matter of, 197 U. S., 488..... 39
Jones v. *Meehan*, 175 U. S., 1..... 32
Lands of Five Civilized Tribes, In re, 199 Fed., 811..... 16
Mullen v. *United States*, 224 U. S., 448..... 12, 15, 42, 43, 44
Perrin v. *United States*, 232 U. S., 478..... 36, 39
Starr v. *Long Jim*, 227 U. S., 613..... 33
Tiger v. *Western Inv. Co.*, 221 U. S., 301..... 3, 12, 19, 20, 26, 33, 34, 36, 37, 40, 42
United States v. *Allen*, 179 Fed., 13..... 43
United States v. *Celestine*, 215 U. S., 290..... 33, 39, 46
United States v. *Kagama*, 118 U. S., 375..... 38
United States v. *Pelican*, 232 U. S., 442..... 36, 39, 46
United States v. *Sandoval*, 231 U. S., 28..... 38
United States v. *Shock*, 187 Fed., 870..... 2, 10, 29
Webb, Ex parte, 225 U. S., 663..... 40

STATUTES.

	Page.
Act of February 28, 1887 (24 Stat., 388)	39, 45
Act of July 1, 1898 (30 Stat., 567)	13
Act of March 1, 1901 (31 Stat., 861)	12
Act of June 30, 1902 (32 Stat., 500)	2, 12, 31
Act of July 1, 1902 (32 Stat., 641)	15, 44
Act of July 1, 1902 (32 Stat., 716)	14
Act of March 3, 1903 (32 Stat., 1008)	13
Act of April 21, 1904 (33 Stat., 189)	17, 32
Act of April 26, 1906 (34 Stat., 137)	18, *et passim.*
Act of May 8, 1906 (34 Stat., 182)	46
Act of June 21, 1906 (34 Stat., 345)	31
Act of May 27, 1908 (35 Stat., 312)	3, 21

MISCELLANEOUS.

Congressional Record, 60th Cong., 1st sess., vol. 42, pt. 7, p. 6781	28
Report of Secretary of the Interior, 1904, pt. 2, pp. 37 to 41	44

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, APPELLANT,
v.
H. U. BARTLETT AND THEO. G. LASHLEY, appellees.
No. 251.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought at the request of the Secretary of the Interior to set aside certain attempted conveyances of an Indian allotment in the eastern district of Oklahoma.

The defendants' general demurrer to the bill (R., 6) was overruled by the district court and, upon their election not to plead further, a final decree was entered against them awarding the relief prayed for by the plaintiff (R., 7). No opinion was rendered by the district court, but its action

was evidently based upon its previous decision of the points in controversy, reported in the case of *United States* v. *Shock* (187 Fed., 870, 873).

Upon the appeal of the defendants the decree was reversed by the circuit court of appeals, which adjudged that the demurrer be sustained and the bill dismissed (R., 18). Its opinion is found in the record at page 15 and is reported as *Bartlett* v. *United States* (203 Fed., 410). The facts are as follows:

The allottee was a duly enrolled member of the Creek tribe, of three-quarters Indian blood. The land in controversy was allotted to him under section 16 of the act of Congress approved June 30, 1902 (32 Stat., 500, 503), known as the Supplemental Creek Agreement, which provides:

> Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs *before the expiration of five years from the date of the approval of this supplemental agreement*, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

This, it will be observed, forbade the alienation of the 40-acre homestead for 21 years from the date of the deed conveying the same, and also forbade any alienation of the residue of the allotment, known as the surplus, before the expiration of five years from the date of the approval of the supplemental agreement, which occurred on August 8, 1902. (See *Tiger* v. *Western Investment Co.*, 221 U. S., 301.) In the present case the allottee attempted to convey not his homestead but his surplus of 120 acres, for which he had received his patent from the principal chief of the Creek Nation, dated March 10, 1903, and approved by the Secretary of the Interior March 29th of that year. On January 26, 1912, he joined with his wife in the execution of a warranty deed, purporting to convey this land to the defendant Bartlett, who, with his wife, quitclaimed three days later to the defendant Lashley. These deeds were set aside by the decree of the district court. The period of restriction prescribed by the supplemental agreement had expired on August 8, 1907, so that the validity of the allottee's conveyance depends upon the construction and legal effect of the following provisions, found in the first section of the act of May 27, 1908 (35 Stat., 312), entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes":

> That from and after sixty days from the date of this act the status of the lands allotted

heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and *all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood,* including minors of such degrees of blood, *shall not be subject to alienation,* contract to sell, power of attorney, or any other incumbrance *prior to April twenty-sixth, nineteen hundred and thirty-one,* except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.

This law declares that *all allotted lands* of enrolled full bloods and enrolled *mixed bloods with three-quarters or more Indian blood* shall be inalienable prior to April 26, 1931, thus classifying three-quarter bloods and full bloods together and, as to them, obliterating all distinctions that had existed respecting the alienation of homestead and surplus lands, adopting one and the same set of rules respecting alienation in all of the Five Civilized Tribes, and ignoring the expiration of previous restrictions as an element in the classifications adopted. This law also expressly continued the authority of the Secretary of the Interior to remove restrictions in individual cases and declared that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." The district court took the view that this latter provision was intended to refer to specific lands from which restrictions upon alienation had been removed, as has frequently been done, by special provisions in the acts of Congress or by special action taken by the Secretary of the Interior pursuant to congressional authorization, and that it was not the intent of the act to except from the restrictions which it provides whole classes of lands, from which the old restrictions had not thus been specifically removed, merely because they had become temporarily free of restrictions through the running out of periods prescribed in earlier legislation. The conclusion of the district court was that Congress by this act of 1908

intended, and also that it possessed the constitutional power, to place new restrictions upon the alienation of allotments like the one in controversy.

The reversal in the circuit court of appeals was based upon the propositions that it was neither the intention of Congress nor within its constitutional power to place new restrictions upon the alienation of Indian allotments which had become freed from the restrictions imposed by prior laws.

The tribal relations of the Creeks have not been abolished. The Government of the United States still exercises the familiar powers of guardianship in the superintendency and control of their affairs. Though the bill does not so expressly allege, as a matter of presumption it may be safely stated that the Indian, Moses Wiley, whose *surplus* allotment is directly involved in this litigation, received also a *homestead* allotment, which, under the supplemental agreement, *supra*, and subsequent legislation, has never been alienable and will not be until April 26, 1931.

THE QUESTIONS PRESENTED.

Two questions of law are presented by the ruling of the court below and our assignment of errors, viz:

1. Whether Congress by the act of May 27, 1908, intended that the surplus allotments held by Creeks of three-fourths Indian blood should be made inalienable until April 26, 1931; and, if so,

2. Whether Congress had the power to reimpose restrictions upon the alienation of such lands after the restriction imposed by the previous law had expired by lapse of time.

ARGUMENT.

I.

BY THE ACT OF MAY 27, 1908, CONGRESS MEANT TO PROVIDE AGAINST THE ALIENATION, PRIOR TO APRIL 26, 1931, OF ANY ALLOTMENT THEN HELD BY ANY MEMBER OF ANY OF THE FIVE CIVILIZED TRIBES OF FULL OR THREE-QUARTERS INDIAN BLOOD, EXCEPTING ONLY SUCH ALLOTMENTS AS HAD BEEN OR AS MIGHT THEREAFTER BE SPECIFICALLY RELIEVED OF RESTRICTIONS BY THE ACTION OF THE SECRETARY OF THE INTERIOR OR OF CONGRESS ITSELF.

1. General statement of the reasons supporting this proposition.

The earlier acts under which, speaking generally, the allotments were made to the members of the Five Civilized Tribes were based on agreements with the tribes separately (the Choctaws and Chickasaws acting together) and were much affected by their various preferences. Consequently the provisions concerning allotments, and the restrictions upon the alienation thereof, which were applicable to one tribe differed materially from those applicable to another. Again, in each tribe all the adult members were allowed the same power of alienation, no attempt being made to draw lines between the Indian and the white, or the full-blood and the mixed-blood members, much less between

various degrees of mixed blood, in an effort to adjust the liberty of conveyance to the natural competency of the allottee to protect his own interests. Congress later took this anomalous situation in hand, and by a series of enactments, of which the act of 1908 is the last, shaped a uniform policy, applicable to all of the tribes alike, in which the power of an allottee to alienate (except in special cases dealt with individually by the Secretary of the Interior or by Congress itself) is gauged by the degree of Indian blood, without regard to the tribe to which he belongs or the earlier restrictions which affected his allotment.

By this legislation the degree of Indian blood in every case is made the test of competency to convey. By the act of 1908 the three-quarter bloods are classed with the full bloods; both alike are declared incompetent to convey *any* land, and the mere fact that a member of any of these tribes is listed on the tribal rolls as possessing three-quarters or more of Indian blood stamps him at once as a person who, in the absence of some special finding to the contrary by the Secretary or by Congress, is to be deemed incompetent to manage his own affairs, at least in so far as the alienation of his allotted land is concerned. There are special provisions regarding the estates of minors and the devolution of title by inheritance or will to which some of the foregoing remarks may not be strictly applicable, but in this case we have to do with the policy of Congress concerning the power

of the three-quarter blood Indian over the land which has been allotted to him directly.

The effect of the statute was to do away with all distinctions of status which existed when it went into operation between the direct allotments of full bloods and three-quarter bloods, and to consolidate them into one category, not only for one tribe, but for all five tribes alike. In consonance with this view it follows that *all* such lands of *all* the full bloods and *all* such lands of *all* three-quarter bloods were intended to be withheld from alienation, as the section above quoted expressly declares, until April 26, 1931, whatever may have been their status when the act was passed, save only such as the act itself evinces an intention to except from its prevailing purpose. That this is true of all such lands as were subject to restrictions at the time no one would venture to deny, even though the restrictions were upon the very verge of expiration. But, pretermitting the question of the *power* of Congress, there can be no logical separation here of lands upon which the old restrictions had expired by limitation from lands to which they still adhered. If Congress possessed the *power* to renew restrictions in the one case the reasons for so doing were precisely the same as the reasons for extending the unexpired restrictions in the other. The necessity for protection was the same in both cases. The general spirit and policy of the statute, and its general language, are applicable to both alike. If, then, we are correct in af-

firming that the power existed—and this we shall endeavor to maintain in the second main division of our argument—it only remains to inquire whether the act itself bears some special evidence of an intention not to exercise this power. In respect of this question, counsel for the appellees have leaned heavily upon the clause that—

> The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.

The district court held the last sentence applicable only to specific cases where restrictions are removed from particular allotments, either by the Secretary of the Interior or by such special provisions as have frequently occurred in the acts of Congress, removing or modifying the restrictions in favor of allottees designated particularly by their names. (*United States* v. *Shock*, 187 Fed., 862, 873.) The court below did not deny the correctness of this view, but expressly declined to pass upon it. We think the view of the district court was correct, for reasons which will be stated below.

There is no other provision in the act which might be even plausibly invoked as intended to except the lands upon which the old restrictions had merely expired, and consequently all such lands, when held by three-quarter blood members, are by

both the spirit and the letter of the law subjected to the same restraints as the lands of full bloods.

Having thus featured generally our argument on this proposition, we will proceed to examine it more particularly.

2. The act of May 27, 1908, should be construed, in pari materia with other acts which will be cited, as the expression of a definite policy to abolish the divergencies and remedy the defects of the various agreements under which the allotments in the Five Civilized Tribes had been made, by classifying all the allotments, irrespective of tribe, according to the degree of the presumed natural competency of the allottees, standardized arbitrarily in accordance with their respective proportions of Indian blood; and by relieving the restraints altogether as to those thus classified as competent, and by forbidding conveyances by those thus classified as incompetent prior to April 26, 1931.

In addition to the blood classification, there is a secondary classification based on the distinction between the homestead and surplus allotments, the act permitting the members of one-half but less than three-fourths Indian blood to dispose of their surplus but not their homesteads; and other classifications respecting the lands of minors and lands inherited. These features, however, are not directly involved here, and are in no way inconsistent with the foregoing proposition.

(*a*) *Review of the provisions concerning alienation which antedated the beginning of this policy.*

The court recently had occasion to go over this legislation quite exhaustively in a number of cases, among which are *Tiger* v. *Western Investment Co.* (221 U. S., 286), involving an inherited Creek allotment; *Heckman* v. *United States* (224 U. S., 413), involving certain Cherokee allotments; *Mullen* v. *United States* (id., 448), and *Choate* v. *Trapp* (id., 665), involving certain Choctaw and Chickasaw allotments, *Goat* v. *United States* (id., 458), and *Deming Investment Co.* v. *United States* (id., 473), involving certain allotments made to Seminole freedmen. The legislative agreements with the several tribes concerning allotments, as well as the later relevant acts of Congress, are discussed in these opinions and are dealt with at length in the briefs filed by the Government, so that we shall content ourselves now with bringing out those aspects which look most directly on the present case.

The *Creek allotments*, including the allotment in this case, were governed by section 16 of the Supplemental Creek Agreement of June 30, 1902 (see *Tiger* v. *Western Investment Co., supra,* p. 301), part of which we have set forth above at page 2. This restrained the alienation of all surplus allotments selected by Creek citizens (*i. e.*, members) for five years from the date of the approval of the agreement, and the alienation of their homesteads for 21 years from the dates of the deeds therefor. The original agreement of March 1, 1901 (31 Stat., 861, sec. 23), had provided for the issuance of deeds by the principal chief, with the approval of the

Secretary of the Interior, upon the ratification of the agreement. These restrictions were uniform; there were no distinctions among the allottees based on blood or actual competency. The full blood was restricted no more and no less than the enrolled white.

The act of July 1, 1898, ratified the agreement with the *Seminoles* (30 Stat., 567, 568) providing for a division of all the tribal lands, with certain exceptions, among all the members. Conveyance or incumbrance of any allotment was forbidden prior to the date of patent, and homesteads were declared inalienable in perpetuity. The date of patent was therefore material only to the alienability of the surplus. The patents or deeds were to be delivered by the principal chief, with the Secretary's approval, upon the extinction of the tribal government.

The act of March 3, 1903 (32 Stat., 1008), declared that the tribal government should not last longer than March 4, 1906; provided that the deeds should be made and delivered thereupon; that there should be a separate deed for each homestead, and that homesteads should be inalienable "during the lifetime of the allottee, not exceeding twenty years from the *date of the deed.*" The tribal governments of this and the other tribes were continued by the joint resolution of March 2, 1906 (34 Stat., 822), and the act of April 26, 1906 (34 Stat., 137, 148, sec. 28); but the last-mentioned act (sec. 6, id. 139) expressly authorized the principal chief of the

Seminoles to execute deeds prior to the cessation of its government (see *Goat* v. *United States*, 224 U. S., at p. 466). This appears to be the last of the provisions affecting especially the Seminole allotments. It will be observed that there was one restriction for the homestead and another for the surplus—the life of the allottee, or 21 years from the date of the deed, in the one case, and the delivery of deed in the other—but no distinctions whatever based on tribal relation, blood, or competency.

The special provisions touching the *Cherokees* are found in the act of July 1, 1902 (32 Stat., 716), accepted by the Cherokee Nation on August 7, 1902 (see *Heckman* v. *United States*, 224 U. S., at p. 426). Section 13 provides that the homesteads "shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the *certificate of allotment*," which shall be a separate one. By section 14 lands allotted to citizens are not to be alienated by the allottee or his heirs before the expiration of five years from the ratification of the act. And by section 15, all lands allotted to citizens, except homesteads, "shall be alienable in five years *after issuance of patent*." The allotment certificates were to be issued by the Dawes Commission at the time of allotment (secs. 11, 21); the patents which were to follow, and convey the title, were to be made and delivered by the principal chief with the approval of the Secretary of the Interior, "when any citizen receives his allotment of land, or when any allotment has been

so ascertained and fixed that title should under the provisions of this act be conveyed" (secs. 58, 59).

The special provisions affecting the remaining tribes, the *Choctaws* and *Chickasaws*, are reviewed in the *Mullen case* (224 U. S., at p. 452 *et seq.*). We need only mention here the act of July 1, 1902 (32 Stat., 641), ratifying the agreement which followed the Atoka agreement (30 Stat., 505, sec. 29), and is therefore known as the Supplemental Agreement with these tribes. By section 11 of the act of July 1, 1902, each member was to receive the equivalent of 320 and each freedman the equivalent of 40 acres of the average allottable land of the tribes. By section 12 each member was to have a homestead equivalent to 160 acres, to be inalienable during his lifetime, not exceeding 21 years from the date of the *certificate of allotment*, and separate certificates and patents were to issue therefor. The allotment of the freedman was also declared inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the certificate of allotment (sec. 13). By section 16 lands allotted to members, except homesteads, were to be alienable, one-fourth in one year, one-fourth in three years, and the balance in five years *from date of patent*, with the proviso that such land should not be alienable at any time before the expiration of the tribal governments for less than its appraised value. The certificates of allotment were to be issued at the time of allotment by the

Commission (sec. 23); the patents were to be issued by the principal chief of the Choctaws and the governor of the Chickasaws, jointly, as soon as practicable after completion of the allotments (Atoka Agreement, 30 Stat., 507), no provision being made for approval by the Secretary of the Interior (see *In re Lands of Five Civilized Tribes*, 199 Fed., 811).

Thus it will be seen that among the Choctaws and Chickasaws also, while there was a distinction between homestead and surplus and a distinction between freedmen and members, there was no distinction based on blood or competency.

These tribal agreements were neither consistent with each other nor (it must be added with all deference, in the light of subsequent experience) with common sense and justice. From the standpoints of the incompetent Indian and of the Government as his only protector, they were wise and just only in so far as they locked up his homestead during 21 years, if he should live so long, and to the more limited extent to which they safeguarded his surplus. From the standpoints of the competent Indian and the future State of Oklahoma, in anticipation of whose creation the agreements were encouraged, they were unwise in so far as they prevented him from selling at will. The situation called for reformation at the hands of Congress, and it was out of this necessity that grew the general and uniform policy defined by the statutes which we will now consider.

(*b*) *Discussion of the later acts of Congress.*

The appropriation act of April 21, 1904 (33 Stat., 189, 204, 205), contains the following:

> *All* the restrictions upon the alienation of lands of *all* allottees of *either of the Five Civilized Tribes* of Indians who are *not of Indian blood*, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that such removal of restrictions is *for the best interest of said allottee*. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for land are recorded.

While the immediate object of this provision was to abolish certain restrictions, it is very pertinent as showing that Congress had come to recognize its duty to adjust the liberty of conveyance to the real competency of the allottee and had come to appreciate the general correlation between competency and Indian blood. Also it demonstrates a

determination upon the part of Congress to deal with the matter of restrictions in a uniform manner in all the tribes alike and to ignore the old provisions as to alienation wherever in conflict with any uniform policy which Congress might think wise.

The act of April 26, 1906 (34 Stat., 137), entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," was an exercise of the plenary power of Congress to fulfill a definite governmental purpose in respect of all of the tribes and their property. It was passed in immediate anticipation of the creation of the new State, the existence of which would make desirable the speedy extinction of the quasi governmental powers thitherto enjoyed by the tribes; would require, so far as consistent with the proper protection of their members, the release of their lands from restraints against taxation and alienation, and would vastly increase the necessity of protecting those members who were incapable of protecting themselves. It evidences throughout an intention of the Government to make its own independent, sweeping, and decisive provisions to meet the situation. The direct action of the Government—the exertion of the governmental power through the Secretary of the Interior upon the tribes and their property—is enormously extended. An examination of the statute will show that nearly all of its provisions are general and uniform as to all

of the tribes, naming them all and making no distinctions between them. Sections 19, 20, 22, and 23 regulate the restrictions upon the land of all the *full-blood* Indians of all these tribes. By section 19 such Indians are denied the power to alienate any of their lands for 25 years from and after the approval of the act. Section 20 declares that certain leases of these full bloods, if not made in writing and approved by the Secretary of the Interior, shall be absolutely void. Section 22 allows the adult heirs of any deceased Indian of any of these tribes, whose selection has been made and to whom a deed or patent has been issued, to sell and convey the lands inherited from such decedent, but forbids such conveyances by full bloods unless approved by the Secretary of the Interior. (*Tiger* v. *Western Investment Co.*, supra.) Section 23 gives a general power to dispose of real and personal estate by will, but provides that no will of a full-blood Indian, devising real estate, shall be valid if it disinherits his parent, wife, spouse, or children, unless acknowledged before and approved by a judge of the United States court for the Indian Territory or a United States commissioner.

In the *Tiger* case it was held that one effect of this legislation, particularly section 22, was to extend the restrictions then existing upon the inherited lands of full-blood Indians, and to inhibit sales by the heirs, unless done with the approval of the Secretary. In that case it was contended very strongly at the bar that Congress did not intend

by the statute to extend the five-year restriction provided by section 16 of the Supplemental Creek Agreement found in the act of 1902, supra. This court, however, held otherwise, saying (221 U. S., 306):

> We think a consideration of this act and of subsequent legislation *in pari materia* therewith demonstrates the purpose of Congress to require such conveyances by full-blood Indians to be approved by the Secretary of the Interior.
>
> The sections of the act of April 26, 1906, under consideration show a *comprehensive system of protection as to such Indians.* Under section 19 they are not permitted to alienate, sell, dispose of, or encumber allotted lands within twenty-five years unless Congress otherwise provides.

Again (p. 308):

> Had Congress intended not to interfere with full-blood Indian heirs in their right to make conveyances after the expiration of the five years named in section 16 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in section 22 made by heirs of full-blood Indians shall be subject to the approval of the Secretary of the Interior.

This policy was continued and further developed by the act of May 27, 1908. The act of 1906 had

dealt specifically with the status of full bloods, without interfering to any considerable extent, if at all, with the existing arrangements concerning the direct allotments of mixed bloods.

The act of 1908, on the other hand, fixes the status of *all* the lands of all the tribes so that—

(1) All land, both homestead and surplus, of freedmen, whites, and mixed bloods of less than one-half Indian blood are freed of all restraint;

(2) Mixed bloods of from one-half to three-quarters Indian blood are freed of restraint as to their surplus allotments, but their homesteads are to be inalienable until April 26, 1931; and

(3) All the lands, both homestead and surplus, of the full bloods and the mixed bloods of three-quarters or more Indian blood, are declared inalienable before April 26, 1931, the date set in the act of 1906 for the expiration of the restrictions on the lands of full bloods.

(See the first section set out, supra, p. 3.)

Section 2 provides that all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by adult allottees for a period of not more than five years without the privilege of renewal, but leases of mining lands and of restricted homesteads for more than one year, and of other restricted lands for more than five years, must have the approval of the Secretary. Section 3 provides that the rolls of citizenship approved by the Secretary shall be conclusive evi-

61796—14——4

dence of the quantum of Indian blood of any enrolled citizen or freedman. Section 5 provides that all conveyances attempted in violation of restrictions shall be "absolutely null and void." By section 6 particular dispositions are made for the protection of all estates of minors, and it is especially made the duty of representatives of the Secretary to advise all allottees, adult or minor, having restricted lands of their legal rights with reference thereto, and to take such steps as may be necessary, even to the bringing of suits in their names, to annul unlawful conveyances and encumbrances, and assist these allottees to acquire and retain possession of their restricted lands. It appropriates $50,000 for litigation by the Government to enforce restrictions, and declares that nothing in the act shall be construed as a denial of the right of the United States itself to maintain such litigation which, it provides, shall be brought without expense to the allottees. The ninth section declares that the death of any allottee shall operate to remove all restrictions upon the alienation of his land, but provides that no conveyance of any interest of a *full-blood* Indian heir in such lands shall be valid unless approved by the proper probate court. This section also safeguards the homesteads of decedent Indians of one-half or more Indian blood in favor of heirs born since March 4, 1906, by providing that such homesteads shall remain inalienable during the life or lives of the issue until April 26, 1931, unless the restrictions are removed

by the Secretary. In default of such issue, the allottee, if an adult, is allowed to dispose of his homestead by will; otherwise, or if such issue should exist but die before April 26, 1931, the land is to descend to the heirs generally, free of all restrictions.

It will be seen that this act everywhere classes three-quarter bloods with full bloods, making no distinction between them, except in section 9, relating to conveyances by full-blood heirs, and section 8, relating to their wills.

(c) *Both the spirit and the letter of the act of May 27, 1908, demand that all the lands of the three-quarter blood Indians be held restricted until April 26, 1931, irrespective of the prior restrictions.*

The act says (sec. 1) that "*all* allotted lands of enrolled * * * mixed bloods of three-quarters or more of Indian blood" shall not be subject to alienation, etc., prior to April 26, 1931.

There is no need, therefore, for further argument about the letter of the law, unless the clause which follows, regarding restrictions "removed" under prior laws was intended to qualify these general terms. For the present we shall assume that such is not the case.

The spirit of the act is in entire harmony with its letter, since beyond peradventure one of the principal objects was to protect the *incompetent* Indians. The immediate purpose, as the title suggests, may have been the removal of restrictions, but, even so, that purpose was qualified and con-

trolled by a determination, manifested again and again throughout the statute, to except from the restrictions only where the *competency* of the landowner may be trusted.

The act admits as *evidence* of competency the proportion of Indian blood, as determined by the rolls, and no other evidence, save the findings of the Secretary or Congress in special cases with which we are not here immediately concerned. Those allottees who have from one-half to three-fourths of Indian blood are expressly declared competent to convey *all* their lands except homesteads, and expressly declared incompetent to convey their homesteads. Immediately upon this all allottees of full Indian blood and all allottees of three-fourths or more of Indian blood are declared incompetent as to *all* their lands. Subsequent sections introduce certain modifications touching the conveyance of inherited lands and the capacity to pass title by devise, but in this first section, which contains the only provisions applicable to conveyances of direct allotments, no distinction whatever is made between full bloods and three-quarter bloods or between the homestead and the surplus allotments of either. The sharp and immediate contrast between the provision respecting the allottees of three-quarters or more of Indian blood and the provision respecting the allottees of less than three-quarters, but not less than one-half, positively precludes the slightest doubt that the surplus allotments of the former were intended to be classed with their homesteads.

The act makes no distinction between the cases where old restrictions have run out and those where they had not, and this for the very good reason that no such distinction can be allowed without throwing to the winds the whole idea of *competency,* which is the pivotal idea of the legislation. There is a real, if slight, logical basis for permitting a half-breed to dispose of his surplus land but not his homestead, while forbidding a three-quarter blood to dispose of either. The half-breed may be deemed sensible enough to look after his minor affairs if protected in those which are more vital; the three-quarter blood may be deemed obviously incompetent in all relations. But what excuse would there be for presuming that of two persons of the same degree of Indian blood one is more sensible than the other because, by a mere fortuity, the term of restraint has expired on a portion of his allotted land?

It would be wholly unwarranted, we submit, in the face of the plain terms of this statute, to *infer* an exception upon the ground that Congress, while *having the power* to include all the surplus allotments of all the three-quarter-blood Indians, must have intended to except those from which former restrictions had recently expired. Such a distinction would stand without a reason in the language of the statute; and, by hypothesis, it could not be supported upon the ground that the power to avoid it was lacking, and, lastly, it could not be maintained as one suggested by the purposes of the

statute, or by the subject matter affected, since, by the test of the statute itself, the three-quarter-blood whose surplus allotment happens to have become free is as incompetent to dispose of it to his own advantage as any of his brothers whom the statute unquestionably was intended to protect.

The same consideration that has persuaded this court to accept the broad and literal meaning of the act of 1906 in the *Tiger case* applies here with added force. Just as the act of 1906, as a "comprehensive system of protection to such [full blood] Indians," was there held operative according to its terms, even to extending restrictions which had already been definitely fixed, so this act of 1908, as a further development of the same system of protection, should be accepted as protecting all lands of the three-quarter bloods. Paraphrasing what is said in the *Tiger case* concerning the former act (p. 308), we may well remark: Had Congress intended not to interfere with three-quarter blood Indian allottees in their right to make conveyances after the expiration of the five years named in section 13 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation.

As said by this court in *Heckman* v. *United States supra* (referring to the decision in *Tiger case*):

> The reasoning of this decision is conclusive as to the validity of the extension by

> section 19 of the act of 1906 of the period of inalienability of lands allotted, as in this case, to full-blood Cherokees. *And the same principle governs the restrictions provided by the act of May 27, 1908* (p. 428). * * *
>
> The policy of restrictions upon the right of alienation was an essential part of the plan of individual allotment, and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance to this extent, at least, of the guardianship which the United States had exercised from the beginning (p. 436).

From the statement given above of the legislation prior to the act of 1908 we find that at the date of that act surplus lands belonging to three-quarter-blood Creeks were free from restriction. The same was possibly true of the Cherokees, while as to the Seminoles and the Choctaws and Chickasaws some were restricted and some were not, depending entirely upon the dates of the patents in individual cases. When we remember that by the provisions of the act of 1906 Congress placed the full bloods of *all* the tribes in the same class—that is, declared that none of them should sell *any* of their lands for twenty-five years—it is exceedingly difficult to believe that by the act of 1908 Congress intended to make a distinction between three-quarter bloods of the different tribes.

The act made no change in the restriction imposed on full bloods by the act of 1906; the period of twenty-five years established in the act of 1906 expires exactly on April 26, 1931, the date mentioned in the act of 1908. This is believed to be significant, clearly manifesting that by the act of 1908 Congress intended to include the lands of three-quarter bloods in the same class as those of full bloods. Upon no other theory can we account for the use of the language employed in that act, namely, "all allotted lands of enrolled mixed bloods of three-quarters or more Indian blood."

This view is strongly supported by the proceedings in Congress at the time the measure was under consideration there, as shown by the following quotation from the conference report:

> This amendment as agreed to in conference provides that Indians of three-quarters or more Indian blood shall be under the same restriction as full bloods. (Cong. Rec., 60th Cong., 1st sess., vol. 42, pt. 7, p. 6781.)

Mr. Sherman, chairman of the committee, in submitting the conference report to the House, said:

> Whereas in the bill as it passed the House there was a provision that full bloods could not alienate their homesteads and could not alienate any other property except with the approval of the Secretary of the Interior, as the conference report presents the proposition that limitation is extended to mixed bloods who have three-quarters or more than

three-quarters of Indian blood. (*Id.*, p. 6782.)

3. That part of the first section of the act of May 27, 1908, which declares that the act shall not be construed "to impose restrictions removed from land by or under any law prior to the passage of this act," refers only to those cases in which restrictions have been removed by the direct action of Congress or by the Secretary of the Interior from particular allotments.

The first section of the act, after classifying all the allottees and their lands with reference to the power of alienation, proceeds as follows:

> Except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and *nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.*

We are to ascertain the meaning of the words italicized.

The court of appeals declined to construe them (R., 17). The district court, in the *Shock case* (187 Fed., 875), explained them thus:

> While the meaning of this sentence is not as clear as it might well have been made, I am of the opinion that it applies to restric-

> tions theretofore removed by the Secretary of the Interior under authority of law and to restrictions removed by such acts of Congress as had theretofore been passed for the purpose not of imposing but of removing restrictions. Before restrictions can be removed they must have been imposed by prior legislation, and in my opinion the only laws referred to as removing restrictions are those which Congress has passed positively removing certain restrictions either of special or general legislation. It does not have the effect of excepting Creek allottees less than full bloods and of three-quarter bloods or more from the operation of the act.

The soundness of the District Court's conclusion is not dependent upon an interpretation of the term "removed," although the first and obvious meaning of that term, thus correctly stated, should have its proper influence upon the construction; the conclusion is demanded by the evident theory and purposes of the statute as a whole.

(*a*) *The opposite construction would render this clause repugnant to the plain terms classifying three-quarter bloods as incompetent in respect of all their lands and to the fundamental purpose of the statute to protect the incompetent Indians.*

In view of what we have already said, elaboration here is unnecessary. The statute is framed upon the theory that *all* the three-quarter bloods, in the absence of a special finding to the contrary, require

the protection of restrictions upon *all* of their lands, no less than do the full bloods. To except those lands from which the old restrictions have happened to expire by mere lapse of time, would bring about a far-reaching and injurious distinction, founded on no reason or principle otherwise apparent anywhere in the entire enactment, and obnoxious to the classification and purposes which it plainly declares.

(*b*) *The clause may readily be construed in avoidance of this result and in harmony with the statute as a whole by confining it to the special cases above mentioned.*

All restrictions, from the beginning, have been imposed upon the theory that they were necessary for the protection of the allottees affected. Consistently with this idea the removal of restrictions in cases where it was found, or believed, that the allottees were possessed of business sense, or that proposed conveyances would be to their advantage, had been going on for years before this act was passed. In many instances this was done by special action of Congress; in many more by the Secretary of the Interior pursuant to authority from Congress. Without attempting to set forth the origin, history, or extent of the process, we may refer, for illustrations, to the numerous removals of restrictions effected by the appropriation act of June 21, 1906 (see 34 Stat., ch. 3504, pp. 345, 346), and to the general powers conferred upon the Secretary by the acts of June 30, 1902 (32 Stat., 500,

503), and April 21, 1904 (33 Stat., 189, 204). As the abolition of restrictions in such instances was consistent with the purpose of protection, it was but natural that Congress in expressing its scheme of *presumed* competency and incompetency by the act of 1908 would be cautious not to override, even in appearance, these findings of *actual* competency which had previously been made in special cases. Hence the proviso (for such it is in effect) which removes such cases from all actual or apparent conflict with the general provisions of the section. It should not be given a meaning which in effect violates the main purpose of the act, when, as we have shown, there is another and obvious meaning which can be assigned to it.

The accuracy of this explanation is confirmed upon the principle *noscitur a sociis*, by the fact that the proviso stands in immediate connection with the clauses authorizing the Secretary to remove any restrictions declared by the act, and assuring his authority "to remove restrictions as heretofore." Quite significantly, these stand between the proviso and the opening portions of the section by which the classes of restrictions are defined.

(*c*) *If doubt exists, this construction should be adopted as the more beneficial to the Indians.*

The doctrine of *Jones* v. *Meehan* (175 U. S., 1) is here involved, but not the same manner of its application. In that case it was assumed, in the absence of any guide to the contrary, that full

power of alienation would be to the Indian's advantage. In this case, with the light of a wider experience, and with the policy of the statute before us, no such assumption is possible. The statute declares that for these three-quarter-blood Indians as a class it is not safe or desirable that they be invested with a disposing control over their property. Under such circumstances it must be assumed that they need the protection of the restriction, and the proviso should be construed accordingly in their interest.

Starr v. *Long Jim*, 227 U. S., 613, 624.
Franklin v. *Lynch*, 233 U. S., 269, 272.
United States v. *Celestine*, 215 U. S., 290.

II.

CONGRESS HAD POWER TO PLACE A NEW RESTRICTION UPON THE LAND IN CONTROVERSY, AS WAS DONE BY THE ACT OF MAY 27, 1908.

1. The case is indistinguishable in principle from Tiger v. Western Investment Co., supra.

The only distinction here between this case and the case of *Tiger* v. *Western Investment Co., supra*, is, that in that case the old restriction had still some months to run before the new restriction was imposed, whereas in this case the old restriction had run out some months before the approval of the act declaring the new one. In legal contemplation this is a distinction without a difference. In that case as in this the land in question was subject orig-

inally to the five-year restriction imposed by section 16 of the supplemental Creek agreement of June 30, 1902, *supra*. Tiger, who was a full-blood Creek, had inherited the allotment in 1903, but, as the restriction applied expressly to heirs as well as to allottees, could not have made a lawful conveyance until August 8, 1907, the date when the five-year period expired. On that day he deeded to the investment company, but in the meantime Congress had declared, by section 22 of the act of April 26, 1906, *supra*, that all conveyances made by heirs of the full blood should be subject to the approval of the Secretary of the Interior. It was urged for the investment company that at the time when this later act took effect, Tiger was a citizen, vested with an estate in fee simple absolute, subject only to the condition that title could not be transferred during the definite and fast expiring period of restriction, and that to extend that period would be to diminish his estate, and deprive him of his property without due process of law. But this court observed, after reviewing a number of earlier decisions, pp. 315, 316:

> Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when

the true interests of the Indian require his release from such condition of tutelage.

The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property. * * *

Conceding that Marchie Tiger by the act conferring citizenship obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the Nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. The inherited lands, though otherwise held in fee, were inalienable without the consent of the Secretary of the Interior until August, 1907, by virtue of the act of Congress. In this state of affairs Congress, with plenary power over the subject, by a new act permitted alienation of such lands at any time, subject only to the condition that the Secretary of the Interior should approve the conveyance.

* * * It rests with Congress to determine when its guardianship shall cease, and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

These, and other portions of the opinion, make plain, we think, that in the view of this court the power to impose the new restrictions came from the existing relation of *guardianship*, importing a duty and a general authority to protect the Indian and his property. This being so, the two cases are necessarily the same in principle.

2. The imposition of restrictions upon the alienation of Indian allotments is but a mode of exercising the power of guardianship still residing in the United States respecting the Indians.

Until the guardianship shall have been renounced, Congress may modify its plans and correct its mistakes. If it has given the Indians a liberty too large for their own good, Congress may curtail it.

The renewal of an expired restriction stands upon the same ground as the extension of one which has still some time to run. The power to extend existing restrictions and the power to impose new restrictions where none exist—one and the same in quality and purpose—are derived from the guardianship of the Federal Government over the Indians.

Tiger v. *Western Investment Co.*, 221 U. S., 286, 315, 316.

Hallowell v. *United States*, *Id.*, 317, 324.

Heckman v. *United States*, 224 U. S., 442, 450.

Perrin v. *United States*, 232 U. S., 478, 485.

United States v. *Pelican*, *Id.*, 442, 450.

Bowling v. *United States*, 233 U. S., 528, 534.

It is almost too manifest to excuse the saying that the existence of such a guardianship as is intended by the opinion in the *Tiger case* and the other opinions above cited, could not be made to depend upon the existence of a particular restriction upon a particular piece of land. If the relations of the Indian to the Government were the same as those of the white man in every respect save for the bare existence of the restriction upon his title, the restriction could not be constitutionally enlarged without the Indian's consent, simply because, being fully *sui juris* himself, his power to dispose of the allotment would be absolutely measured by the terms of his deed, and any attempt to vary those terms would be a clear invasion of his property. It would, of course, be absurd to say that the authority to vary the restriction is conferred by the restriction itself. One might as well affirm that black is white, as argue that a deed or patent purporting to convey a fee simple title subject only to a condition that the land shall remain inalienable during a specified number of years, reserves authority in the grantor to extend the period of restraint. If, therefore, the power that was applied in the *Tiger case* is not to be derived from the restriction itself, but must come from a guardianship of which the restriction is merely one evidence, it must follow that the existence of the restriction is wholly immaterial to the application of the power.

Let us test this proposition somewhat. It is well understood that the powers and duties of the General Government respecting the Indians arise not only from the express constitutional power to regulate commerce with the Indian tribes, but also out of the peculiar relationship of dependency and control which has always existed between the Indians and the United States through the compulsion of circumstances. (*United States* v. *Kagama*, 118 U. S., 375, 384; *United States* v. *Sandoval*, 231 U. S., 28, 46.) As this court observed in the case of *Kagama:*

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of *protection* and with it the *power* (p. 384).

What power? We answer our own question by saying: A power adequate to the occasion. If, while an Indian remains a ward of the Nation, Congress makes a gross mistake in giving him full control over property essential to his welfare, but which he is no more fitted to protect and dispose of properly than a child would be, is Congress impotent to correct this mistake for the protection of the Indian and the national honor? If so, what has become of the guardianship?

We have been told repeatedly that the national guardianship over these Indians, citizenship or no

citizenship, has not ceased and will not cease until Congress shall deliberately and unequivocally put an end to it. Notwithstanding the opinion in *Matter of Heff* (197 U. S., 488), which was thought for a time to mean that Indians who have been made citizens and (unlike the members of the Five Civilized Tribes) expressly subjected to State laws, are irrevocably deprived of the Federal care, we now know that even they are still wards of the Government—that there still exists between them and the United States a peculiar personal relation which empowers the Government to protect them from the injuries of liquor and to punish those who commit crimes against them within the boundaries of allotted lands. (*United States* v. *Pelican*, 232 U. S., 442, 450, 451; *Perrin* v. *United States*, *Id.*, 478, 481, 486.)

The members of the Five Civilized Tribes have never been subjected to the State laws as was the Indian described in the *Heff case*. The peculiarities of his status were said to be determined by the provisions of the general allotment act of 1887 (24 Stat., 388), section 6 of which declared that the allottees thereunder should "have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside," etc. In the absence of any such provision as this it is plain that the *Heff case*, as explained in the case of *United States* v. *Celestine* (215 U. S., 278, 290), has no bearing on the status of these Oklahoma

Indians. Indeed, as this court observed in the *Tiger case* (p. 309):

> In passing the enabling act for the admission of the State of Oklahoma, where these lands are, Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands, and property, which it had prior to the passage of the act, June 16, 1906 (34 Stat., 267, c. 3335).

See also *Ex parte Webb* (225 U. S., 663, 682).

It would seem clear, then, that the power of Congress in respect of these Indians was no less on May 27, 1908, than it was when the State of Oklahoma came into the Union. The need of protection was (and is) not less but greater. Immediately the question recurs: What has crippled this power so that Congress may no longer afford protection for all of their property?

We may safely assume that such a dangerous limitation upon so beneficent a power—a power for which, when extinguished, no substitute can ever be supplied—will never be accepted by this court without the clearest and most convincing reasons; and we confidently affirm that no reason worthy the name can be imagined. If the guardianship were a mere trusteeship over property it would be possible for Congress to release a part of the subject matter while retaining control over the rest. But the guardianship is undoubtedly a guardianship of person as well as of property. Hence the right to

deal with the Indian liquor problem, the right to educate the Indians, the right to expend public money on their behalf in countless ways, and to superintend, counsel with, and guide them in their personal affairs. Such a guardianship is not susceptible of being done away with piecemeal in such wise that the Indian shall become completely *sui juris* in respect of one piece of land while remaining under complete disability in respect of another.

Take the present case, which is typical of many. The Indian received two allotments, homestead and surplus. The homestead he may not alienate or encumber before April 26, 1931, and not then if Congress sees fit to extend the period. The ability of Congress to extend the restriction on the homestead is not due to the restriction itself or permitted by anything in the Indian's deed. If the Indian were an ordinary citizen holding such a deed, the authority would not exist. The guardianship is not limited to this particular piece of land. The Indian is a ward of the Government. It is the Government's peculiar function and duty to afford him protection. He needs protection in respect of all of his property. And yet it is held by the court below that because the Government, by an error of judgment, has once seen fit to permit him to dispose of the other piece of land, he is as a matter of constitutional right, a competent *person* in respect of that piece, while remaining an incompetent *person,* requiring governmental protection, as to the other, and in his demicapacity of com-

petent person, may oppose the Constitution to every effort of the Government to protect him. We are unable to understand this conclusion.

Congress, whenever it chooses, may renounce its control and its protective care over the individual Indian. Until that is done, it is safe to assume that there is a reason for continuing the relation, that the Indian is not ready for complete enfranchisement and that whatever liberties of disposition over his property are allowed him from time to time are in the way of experiment and are in law, as they should be in all righteousness, subject to be recalled if found hasty and ill advised.

While this court has often referred to the restrictions on alienation as an evidence of the controlling power, we thing it very clear that never in any of its numerous opinions, in which the persistence of the national guardianship has been again and again affirmed, was it intended to be intimated that the guardianship in any sense depends upon the restrictions or exists merely for the protection of restricted lands. The restrictions, as we have said, are but one mode of exercising the general protective power which has existed always since the Government was formed.

The learned court below, on the other hand, appears to have supposed that the decisions in the *Tiger case*, *Heckman case* (224 U. S., 415), *Mullen case* (*Id.*, 448), *Goat case* (*Id.*, 458), and *Deming Investment Company case* (*Id.*, 471) were determined upon the theory that the Government's

power to control the alienation of an allotment depends upon the retention of the legal title. This seems to be due to a misunderstanding, since all of those cases concerned land which had been deeded in fee to the Indians. There is another clear misapprehension in the opinion (R., 18) in the statement or suggestion that the question of the power to extend restrictions was involved in either of the last three cases above mentioned. The court below, after saying that the question was not involved in the *Allen case* (179 Fed., 13), proceeds to declare that in the *Mullen, Goat,* and *Deming cases*—

> the judgment [in the *Allen case*] was reversed, in so far as it held that the United States could maintain an action to set aside conveyances made to lands after the restriction had terminated.

The right of the United States to sue for the enforcement of existing restrictions was involved in those cases, as were also a number of questions as to what restrictions were meant to be imposed by Congress; but the power of Congress to renew restrictions was not involved in any of them.

In the *Mullen case,* however, the power was evidently considered and its ~~extent~~ existence recognized. By section 19 of the act of April 26, 1906, *supra,* it was provided, as we have seen, that no full-blood member of *any* of the tribes should sell *any* lands allotted to him until the expiration of 25 years from the date of the act. When that act was passed many members of the Choctaw and Chickasaw

Tribes had received patents for their allotments (see Report of the Secretary of the Interior for 1904, pt. 2, pp. 37 to 41), and, by the Choctaw-Chickasaw agreement, ratified by the act of July 1, 1902, *supra*, members of these tribes, full bloods as well as others, were authorized to sell one-fourth of their surplus in one year and one-fourth in three years from the date of patent; consequently, on April 26, 1906, a portion—at least one-half or one-fourth—of these lands was alienable, while other portions remained inalienable. We may say parenthetically that it has never been contended that after the passage of the act of that date any of the lands allotted to full bloods remained alienable, and, of course, if Congress had authority to reimpose a restraint upon the alienation of the lands of full bloods, there was equal authority in respect of the lands of mixed bloods. The *Mullen case* involved a sale by a Choctaw full blood which had occurred before the act of 1906. This court, while finding that no restriction existed at the time of the sale, took pains to point out that the sale antedated *the act*, and observed (p. 457), that when the sale was made "the heirs of the full blood taking under the provisions of paragraph 22 of the supplemental agreement had the same right of alienation as other heirs."

The legislation providing for the allotment of lands to Indians generally furnishes a clear illustration of the power of Congress to enact a law materially modifying the status acquired by Indians

under a prior law. The general allotment act of February 28, 1887 (24 Stat., 388), after providing for the allotment of lands and the issue of trust patents under which the United States would hold the land alloted in trust for the sole use of the Indian for the period of 25 years, declared in section 6:

> That upon the completion of said allotments and the patenting of the lands to said allotees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner im-

pairing or otherwise affecting the right of any such Indian to tribal or other property.

After that law had been in operation for more than 19 years, and many thousands of allotments had been made for which so-called trust patents had been issued, Congress, by the act of May 8, 1906 (34 Stat., 182), amended section 6 of the act of 1887 so as to provide that full rights of citizenship should accrue to the Indians only upon the issue of the fee-simple patents provided to be issued at the expiration of the trust period, thus deferring the enjoyment of those rights to the expiration of the trust period, notwithstanding that under the act of 1887 an allottee became entitled to such rights immediately upon the completion of the allotment and the issue of the trust patent. The act making this change was considered by this court in the case of *United States* v. *Celestine* (215 U. S., 278) and also in the case of *United States* v. *Pelican* (232 U. S., 442); and in neither case was any doubt entertained as to the validity of the act, but, on the contrary, in the latter case the right of Congress to exercise such power was expressly upheld (p. 401).

3. The power to reimpose restrictions is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of any vested right of property. But the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held, and the imposition of a restraint upon his

liberty of disposition is a necessary and legitimate means of protecting his property.

When Congress has conferred a right of property upon the individual Indian it may not afterwards arbitrarily take it away. Therefore, in *Choate* v. *Trapp* (224 U. S., 665), it was held that an exemption from taxation accompanying an allotment and constituting part of the consideration granted to the Indian for the surrender of his interest in the tribal estate as a whole, could not be impaired by that clause of the act of May 27, 1908, which provides that lands from which restrictions have been removed shall become subject to taxation (35 Stat., 312, sec. 4). The exemption was held to be a vested right attaching to the land for a definite period, and as the destruction or impairment of such a valuable privilege could have no tendency other than the very reverse of protecting the Indian's property, the attempt was clearly out of all proper relation with the functions and powers of the Government as the Indians' guardian. Although the decision in the *Choate case* seems to have been much relied on by our opposing counsel, we think it very plain that it is in no way opposed to our present contention, but is rather of assistance, inasmuch as, in marking a point where the line must be drawn, it seems the better to establish the principle upon which the things which the Government may do are delimited from those which are forbidden. The court made it very plain that the power to deal with restrictions on

alienation, being in effect a power, resting in guardianship, to control the status of the Indian ward, is very different from a power, not merely to protect, but actually to take away the property with which he has been unconditionally invested. Thus, page 673:

> The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the *status of the ward* and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.

Page 678:

> Nothing that was said in *Tiger* v. *Western Investment Co.* (221 U. S. 286) is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member, or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that "Tiger was still a ward of the Nation, so far as the alienation of these lands was con-

cerned, and a member of the existing Creek Nation," it was said that " incompetent persons, though citizens, may not have the full right to control their property," and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the fifth amendment.

4. The power to protect the property of an Indian ward, being a power of the General Government, is not to be diminished or impaired in its full usefulness by the circumstance that the property has been tentatively subjected to the taxing power of a State, but the right of the State of Oklahoma to continue taxing the land in controversy is not involved and could not constitute a defense in the present case.

It will be time enough to consider the right of taxation when some question concerning it is duly presented to the court by some one whose rights are affected. These appellees have no standing to question the constitutionality of the statute upon the ground that it infringes the prerogative of the State.

Furthermore, even if it be assumed that the taxing power, having once attached to the land, may

not be dislodged by the act of Congress, that fact would afford no reason for denying the power of Congress to control the conduct of the Indian.

But, although the matter seems so clearly immaterial, we submit that, as long as Congress maintains its control over Indian lands, it will have plenary discretion to determine whether or not they may be taxed by the States in which they lie; and that, in view of the nature and reasons for this Federal authority, there would be no satisfactory ground for contending that the permission, once granted, must remain perpetual. The State's taxing power is necessarily displaced whenever real or personal property is acquired by the United States, because inconsistent with Federal ownership and control. It would be displaced whenever it stood in conflict with any of the constitutional purposes of the Government respecting the subject matter affected.

2. The power to reimpose restrictions is consistent with the full protection of all rights in the land which may have become vested in third persons while the allottee was free to convey.

In respect of this it suffices to suggest that if an Indian, clothed at the time with the power of disposal, should mortgage or convey his allotment, the act, being valid under the law as it then was, would confer vested rights which could not be disturbed. This has nothing to do with the power of Congress to reassert its protective authority over the prop-

erty—fee or equity—which still remains to the Indian.

CONCLUSION.

Many similar cases await the outcome of this one. But the importance of the questions here presented goes far beyond any bearing that they may have upon existing transactions. If the decision of the court below be correct, the injury of its effects upon a large class of incompetent Indians in Oklahoma and elsewhere, and of the limitations it imposes upon the protective power of Congress for all the future, could not well be overestimated.

It is respectfully submitted that the decision is plainly erroneous and should be reversed.

ERNEST KNAEBEL,
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Attorney, Department of Justice.

SEPTEMBER, 1914.

○

No. 251.

In the

Supreme Court of the United States.

October Term, 1914.

UNITED STATES OF AMERICA, - - - *Appellant,*

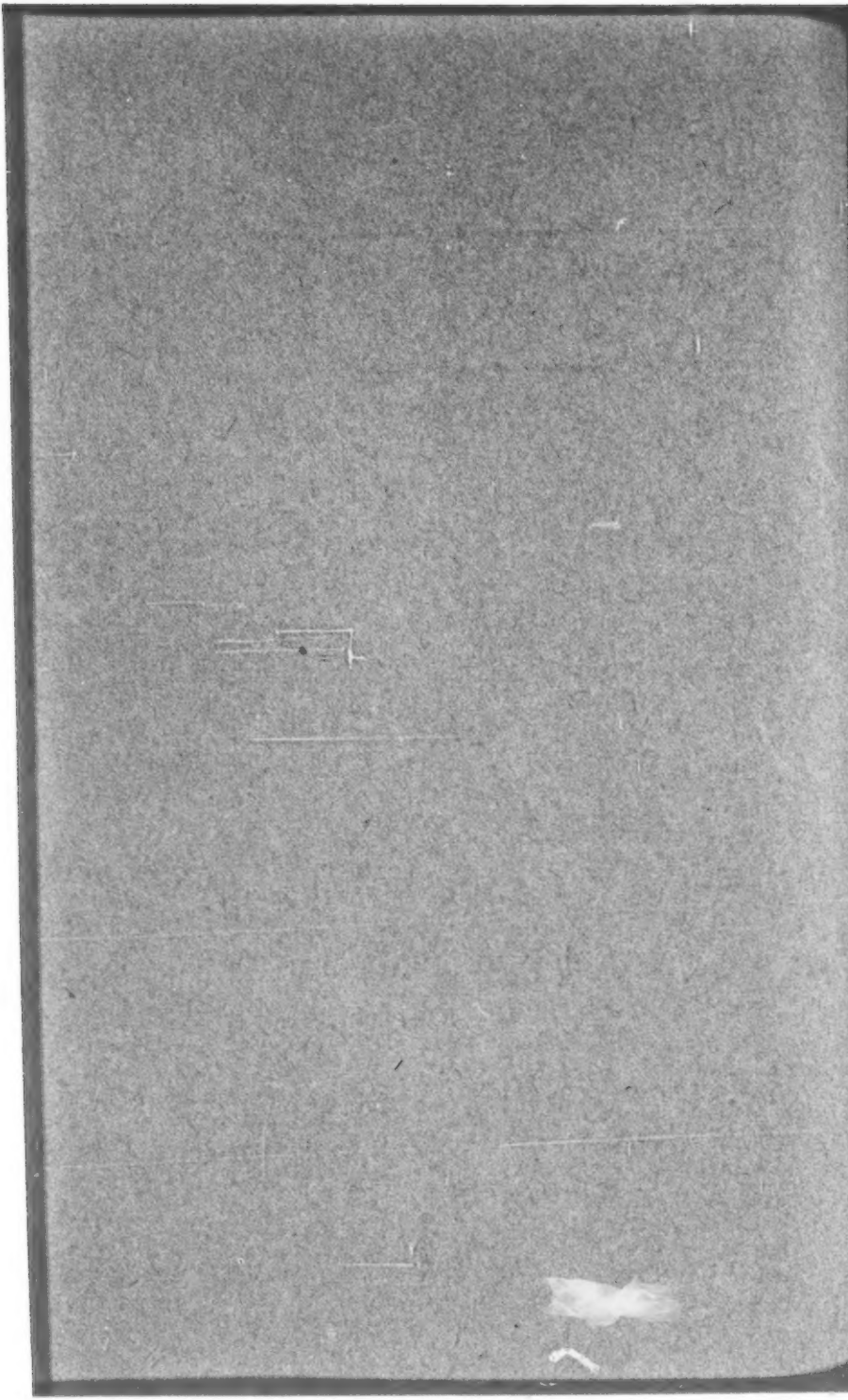
vs.

H. U. BARTLETT and THEO. G. LASHLEY,
Appellees.

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

Brief and Argument for Appellees.

GEO. S. RAMSEY,
EDGAR A. de MEULES,
Counsel for Appellees.



INDEX.

Pages

History of separate Agreements made with the Creeks, Cherokees, Choctaws, Chickasaws and Seminoles... 2 to 12

Review of Acts of Congress subsequent to ratification of various Agreements. . . . .12 to 17

Act of May 27, 1908, analyzed in light of then existing conditions and restrictions.....17 to 20

Government admits no restrictions on sale of lands of mixed-blood Creeks, on July 27, 1908..... 20

ARGUMENT, beginning. 21

Act of May 27, 1908, disclaimed intention to again restrict sale of any land from which restrictions had been removed. 23

Constitutionality of Act of May 27, 1908, being at least in grave doubt, it should be construed so as to avoid Constitutional question. . . . .24 to 28

Title of Act is to remove restrictions, and in case of doubt as to construction title of Act considered.....28 to 30

If Act intended to declare all three-quarter-bloods incompetent and to restrict sale of any land then free, why was operation of Act suspended 60 days?.....30 to 32

Clause pertaining to restrictions on mixed-bloods of three-quarter or more Indian blood had wide field for operation, excluding Creek Nation. . . . .32 to 33

Restrictions on Moses Wiley and all mixed-blood Creeks, irrespective of fractional quantum of Indian blood, were "removed" "under" a "law," to-wit: Section 16 of Act of Congress approving Supplemental Creek Agreement. . . . .33 to 46

If construction of Act in doubt—then construction insisted on by the Government should be rejected, because it is unjust and infringes upon the State's right to tax the lands after the Act, though they were subject to State taxation before.....46 to 51

If Act put restrictions on land then free it is unconstitutional. 52

The Government abandoned its guardianship over unrestricted lands. 53

INDEX—Continued.

Pages

Personally, the Indians were granted statehood by the Oklahoma Enabling Act, and with respect to their persons and unrestricted lands and all other property are on an equality, civilly and politically, with all other citizens of the State, and have as citizens of the United States and Oklahoma the same exemptions from Federal control, enjoyed by citizens of any other State. . . . . 55 to 67

When Congress once permitted lands to become free from restrictions, the Indian, being a full fledged citizen of the State, the guardianship over all the unrestricted property of that Indian ceased, whether that property was acquired by gift, purchase, inheritance, or allotment—when once free, always free. . . . . 67 to 71

Congress having permitted State's power to tax to vest, is conclusive evidence it abandoned its guardianship over that land, and there is no power in Federal government to withdraw it from full dominion of the State. . . . . 71 to 83

Act of May 27, 1908 (35 Stat. L. 312). . . . . Appendix, 1

Supplemental Creek Treaty (32 Stat. L. 500). . . . . Appendix, 3

Cherokee Agreement (32 Stat. L. 716). . . . . Appendix, 4

Supplemental Choctaw and Chickasaw Treaty (32 Stat. L. 641). . . . . Appendix, 5

TABLE OF CASES.

Pages

Allen v. Oliver, 31 Okla. 356....18
Allgeyer v. State, 165 U. S. 580....80

Bahuand v. Biz, 105 Fed. 485....62
Barrett v. Kelley, 31 Tex. 476....62
Black on Int. of Law, p. 205....41
Blanck v. Pausch, 113 Ill. 60....61
Blue Jacket v. Com., 5 Wall. 737....47, 70
Bowles v. Haberman, 95 N. Y. 246....64
Boyd v. Neb., 143 U. S. 135....62

Celestine, In re., 215 U. S. 278....79
Civil Rights Cases, 109 U. S. 22....80
Choate v. Trapp, 224 U. S. 665....37, 45, 50, 51, 82
Collins v. Hadley, 78 N. E. Rep. 353....41
Cryer v. Andrews, 11 Tex. 170....62

Dick v. U. S., 208 U. S. 353....76

Elks v. Wilkins, 112 U. S. 101....60
Endlich, Stat. Interp., Secs. 53 and 370....41

Fellows v. Denniston, 5 Wall. 761....47

Gritts v. Fisher, 224 U. S. 640....38

Heff, In re., 197 U. S. 505....60, 69, 75, 81

Lochner v. New York, 198 U. S. 45....80
Lone Wolf v. Hitchcock, 187 U. S. 565....38

Minneapolis v. Beum, 56 Fed. 576....62
Mullen v. U. S., 224 U. S. 448....10

O'Conner v. State, 71 S. W. 409....61
Osterman v. Baldwin, 6 Wall. 116....62

Pennock v. County Com., 103 U. S. 44....72
People v. Barrett, 67 N. E. 742....64
People v. Washington, 36 Cal. 658....65
Powell v. Penn, 127 U. S. 678....79

Redbird v. U. S., 203 U. S. 76....38
Risley v. Village, etc., 64 Fed. 457....40

Sheehan v. L. & R. Ry Co., 101 S. W. Rep. 380....41
Slaughter-House Cases, 16 Wall. 73....60
Smythe v. Fish, 23 Wall. 374....29
Stoddard v. Chambers, 2 How. 284....41
Sutherland Stat. Const., Vol. 2, Sec. 358....41, 49

TABLE OF CASES—Continued.

Pages

Thomas v. Gay, 169 U. S. 271.....38, 52
Tiger v. Western Inv. Co., 221 U. S. 286.....24, 81
Truskett v. Closser, 198 Fed. 835.....18

U. S. v. Fisher, 2 Cranch 358.....29
U. S. v. Hall, 171 Fed. 214.....60

U. S. v. Hallenwell, 221 U. S. 320.....77
U. S. v. Harris, 106 U. S. 629.....67
U. S. v. Palmer, 3 Wheat. 610.....29
U. S. v. Rickert, 188 U. S. 433.....47
U. S. v. Sandoval, 231 U. S. 28.....77, 78
U. S. v. Schock, 187 Fed. 871.....34
U. S. v. Sutton, 215 U. S. 291.....77
United States v. Bennett, 232 U. S. 303.....28

Yellow Beaver v. Board of Com., 5 Wall. 757.....47

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 251

UNITED STATES OF AMERICA, - - - *Appellant,*

vs.

H. U. BARTLETT and THEO. G. LASHLEY, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *and* ARGUMENT *for* APPELLEES.

May It Please the Court:

The deed in question having been executed and delivered in January, 1912, by Moses Wiley, a duly enrolled three-quarter-blood Creek Indian, and nearly five years after all restrictions against alienation had been removed under the Original and Supplemental Creek Agreements, the questions presented are, *first*, whether or not the Act of Congress of May 27, 1908, re-imposed restrictions against alienation, and if so, is the act valid and constitutional.

Moses Wiley, the allottee, was enrolled as a three-quarter-blood Creek by the Commission to the Five Civilized Tribes, and after enrollment, and on the 30th of June, 1902, the land in question was selected by him as his allotment, and as alleged in the bill "there was thereupon duly allotted to him as his allotment and distributive share of the public lands of said Creek Tribe or Nation of Indians," the one hundred and twenty acres of land involved; and thereafter and on the 10th of March, 1903, the patent was executed by P. Porter, Principal Chief of the Creek Nation, which was approved by the Secretary of the Interior on March 29, 1903, and duly recorded in the records of the Commission to the Five Civilized Tribes. For brevity we shall refer to the Commission to the Five Civilized Tribes as the "Dawes Commission."

Under the authority of section 3 of the Act of Congress approved March 1, 1901 (31 St. L. 861), the Dawes Commission allotted this land to Moses Wiley. The act is commonly referred to as the Original Creek Agreement. The Dawes Commission and the Commissioners appointed by the Creek Nation made the agreement in 1900, and it was ratified by the Creek Nation on May 25, 1901, and by Congress by the act approved March 1, 1901, above referred to. One hundred and sixty acres is the standard allotment in the Creek Nation as provided for by section 3 of the Original Agreement. Section 23 of said Original Agreement provides for

the execution, recording and delivery of patents and is as follows:

"23. Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.

The acceptance of deeds of minors and incompetents, by persons authorized to select

their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

The transfer of the title of the Creek tribe to individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company any right, title or interest in or to any of the lands in the Creek Nation.

All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

Restrictions Against Alienation.

Section 7 of said Original Creek Agreement (31 St. L. 861) provides that:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

This section further requires each citizen to

"select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance

whatever for twenty-one years, for which he shall have a separate deed, conditioned as above."

A Supplemental Agreement was afterwards negotiated by the Dawes Commission with the representatives of the Creeks which was approved by Act of Congress of June 30, 1902 (32 St. L. 500), ratified by the Creek Nation on July 26, 1902, and made effective on August 8, 1902, by the proclamation of the President of the United States. Section 21 of this Supplemental Agreement provides that it shall become binding upon the United States and the Creek Nation and all persons effected thereby when it shall have been ratified by Congress and the Creek National Council and the fact of such ratification shall have been proclaimed as thereinafter provided.

Section 16 of this Supplemental Agreement is a substitute for section 7 of the Original Agreement, and as such substitute defined all the restrictions against alienation. Section 16 of this Supplemental Agreement prohibited alienation irrespective of the degree of blood of the allottee for a period of five years from the date of the approval thereof, *except with the approval of the Secretary of the Interior.* The five-year restrictions against alienation imposed by said section 16 ended on August 8, 1907. In *Tiger* v. *Western Investment Company*, 221 U. S. 305, this court referred to the period of restrictions

imposed by the Supplemental Creek Agreement and said:

> "Alienation was forbidden until expiration of the five-year period, to-wit, until August 8, 1907."

See *Baker* v. *Hammett*, 23 Okla. 480, 100 Pac. 1114.

Said section 16 of the Supplemental Agreement re-enacted the provisions of section 7 of the Original Agreement requiring each citizen to select from his allotment forty acres of land as a homestead and declared that the same should be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and provided that a separate deed should issue to each allottee for his homestead. It will thus be seen that the duration of the restrictions against alienation of the surplus 120 acres in the Creek Nation in no way depended upon the date of the delivery of the deed or patent. The restriction against alienation on the homestead, however, remained for twenty-one years from the date of the deed.

Cherokees.

In the early part of 1902 the Dawes Commission negotiated an agreement with the Cherokees which was ratified by Congress by the act approved July 1, 1902 (32 St. L. 716), and afterwards ratified by the Cherokee Nation on August 7, 1902.

Section 11 of the Cherokee Agreement provided for an allotment of land "equal in value to one hundred and ten acres of the average allotable lands of the Cherokee Nation," and some Cherokees got more in quantity than one hundred and ten acres, and others got less in quantity.

Whereas, in the Creek Nation all Creeks received an allotment of one hundred and sixty acres irrespective of its value.

Section 13 required each citizen of the Cherokee Nation to designate a homestead out of his allotment equal in value to forty acres of the average allotable lands of the tribe, and prohibited its alienation "during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment," and provided that during the time said homestead is held by the allottee the same shall be non-taxable and not liable for any debt contracted by the allottee while so held by him.

Section 14 provides that:

> "Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the *date of the ratification of this act.*"

And section 15 provides that:

> "All lands allotted to the members of said tribe, *except* such land as is set aside to each for a *homestead* as herein provided, shall be alienable in *five years after issuance of patent.*"

Taking these three sections together, to-wit, 13, 14 and 15, we find that (13) the homestead is inalienable "during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment," and that (14) lands allotted shall not at any time be encumbered, taken or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or *his heirs* before the expiration of five years from the date of the *ratification of the act*, and that (15) allotted lands, *except the homestead*, shall be alienable within five years after issuance of patent.

In other words the allottee cannot alienate the homestead for twenty-one years from date of certificate of allotment; neither the homestead nor the surplus, under section 14, can be encumbered, taken or sold for any debt, nor be alienated by *the heirs* before the expiration of five years from the date of the ratification of the act, and under section 15 the surplus cannot be alienated by the allottee prior to expiration of five years after the issuance of patent.

Section 14 evidently has no field for operation as to the alienation by the allottee in person, restrictions against alienation by him being imposed by sections 13 and 15. Section 14 operates solely on the heirs and prohibited alienation for five years from the ratification of the act.

No patents were issued in the Cherokee Nation until September 30, 1905, and while the heirs of dead

Cherokee allottees could alienate under section 14 after August 7, 1907, none of the allottees, irrespective of degree of blood, could alienate until five years after September, 1905. The Cherokee patents were not all delivered at once, and in order to determine just when any particular allottee could alienate his surplus it was necessary to ascertain the date of the issuance of his patent, and inasmuch as the first patent in the Cherokee Nation was issued on September 30, 1905, it must be true that no allottee in the Cherokee Nation (no matter of what degree of blood) could alienate his allotment at the time the Act of May 27, 1908, took effect.

Choctaws and Chickasaws.

The restrictions against alienation by Choctaws and Chickasaws will be found in the Supplemental Choctaw and Chickasaw Agreement approved by Act of Congress of July 1, 1902 (32 St. L. 641). Section 11 of the agreement provided for an allotment to each Choctaw and Chickasaw equal in value to three hundred and twenty acres of the average allotable land, and some members received seven or eight hundred acres, and some less. Section 12 required each citizen to designate a homestead out of his allotment equal in value to one hundred and sixty acres of the average allotable lands of the nations, and prohibited its alienation "during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and sepa-

rate certificate and patent shall issue for said homestead."

Section 13 made the allotment of each freedman inalienable during his lifetime, not exceeding twenty-one years from the date of the certificate of allotment. Each freedman only received forty acres as provided for in the Atoka Agreement (30 St. L. 495).

Section 15 declares that the allotments of members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character prior to the time that such lands may be alienated under this act, and prohibited their sale, except as provided for in this act. Section 15, therefore, provides only against involuntary alienation. Section 16 under consideration by this court in *Mullen* v. *United States*, 224 U. S. 448, operated as a restriction against the surplus, the homestead restriction being provided for in section 12. Alienation of the surplus is restrained until after *issuance of patent*, and in one year after the issuance of patent one-fourth of the surplus in acreage might be alienated, and another fourth in acreage in three years after issuance of patent, and the balance, one-half, alienated in five years after the issuance of patent, provided, however, that no part of the surplus could be alienated by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

The first patent in the Choctaw and Chickasaw Nations was issued in 1905. And, consequently, irrespective of the degree of blood, none of the Choctaw and Chickasaw allottees could alienate any part of their allotments prior to the summer of 1907, and then only one-fourth. Three-fourths of all the surplus of *all* the Choctaws and Chickasaws by blood was inalienable, irrespective of degree of blood at the time the Act of Congress of May 27, 1908, became operative.

Seminoles.

The Seminole Agreement was approved by Act of Congress of July 1, 1898 (30 St. L. 567). This agreement was considered by this court in *Goat* v. *United States*, 224 U. S. 458. The agreement provides that:

> "All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void."

It further provides that:

> "Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity."

These restrictions were imposed without regard to the degree of blood.

No patents were issued in the Seminole Nation prior to July 27, 1908. Thus, none of the restrictions against the alienation of lands in the Seminole

Nation, irrespective of degree of blood, had been removed under the provisions of the Seminole Agreement, and but for Acts of Congress removing restrictions upon certain classes all citizens of the Seminole Nation would have remained under the original restrictions until long after the Act of May 27, 1908. *It will also be noticed that in none of the agreements made with the Five Tribes was authority conferred upon the Secretary of the Interior to remove restrictions against alienation.*

Section 7 of the Original and section 16 of the Supplemental Creek Agreement did provide for alienation of the surplus by the allottee with "the approval of the Secretary of the Interior." Neither the Cherokees, Seminoles, Choctaws nor Chickasaws, irrespective of degree of blood, under their respective agreements and Acts of Congress ratifying them, had authority to alienate any part of their allotments *with the approval of the Secretary of the Interior.*

First Act of Congress Removing Restrictions, and Empowering the Secretary of the Interior to Remove Restrictions.

The Act of April 21, 1904 (33 St. L. 189), is the first Act of Congress removing restrictions from any class of citizens of the Five Tribes. As suggested in the Government's brief the provisions imposing restrictions against alienation in the various

tribes, while applying to all citizens of the particular tribe alike and irrespective of blood, differed from each other in their scope, extent and operation.

The Act of April 21, 1904, removed all restrictions upon alienation of all surplus lands of all adult allottees *not of Indian blood* of all the tribes, but made no change or alteration of or unification in the restrictions provided for in the respective agreements against alienation by citizens of Indian blood, and made no changes in any of the tribes with respect to alienation of homesteads. The act simply swept away restrictions in each of the tribes against alienation of surplus lands by adult allottees not of Indian blood, and left all homesteads, minors and citizens of Indian blood under the particular restrictions imposed by the agreement with that special tribe. This is true with the following proviso: The Secretary of the Interior, for the first time, was authorized to remove restrictions against alienation on all surplus lands of citizens of Indian blood. That portion of the Indian Appropriation Act of April 21, 1904, above discussed is as follows:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Sec-

retary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe," etc.

Under section 7 of the Original and section 16 of the Supplemental Creek Agreement a full-blood citizen could alienate his land with the approval of the Secretary of the Interior. This involved submitting to the Secretary of the Interior a particular transaction, that is, a conveyance or deed for the Secretary's approval. The Secretary was required to investigate the consideration and fairness of the transaction and give or withhold his approval of that particular deed as he saw proper. Whereas, under the Act of April 21, 1904, the Secretary had authority and did in actual practice remove the restrictions from a particular piece of land, leaving the allottee to subsequently and whenever he saw proper make his own contract, negotiate his own sale, and execute his own deed without the advice or approval of the Secretary. Historically speaking the Secretary in some instances prior to the Act of April 21, 1904, approved deeds executed to the entire surplus and sometimes to fractional parts of their surplus, thus leaving the remainder of their surplus under the five-year restriction against alienation. Likewise, in actual practice the Secretary in exercising the authority conferred upon him by the above quoted Act of April 21, 1904, removed the restrictions from *fractional parts* of the allottees' lands. Sometimes the Secretary would remove

the restrictions from forty acres of a Creek, Cherokee, Choctaw, Chickasaw or Seminole by blood, thus leaving the remainder of his allotment under restrictions.

Next — Act of April 26, 1906.
(34 St. L. 137.)

The next general legislation on the subject is embodied in the Act of April 26, 1906 (34 St. L. 137). The provisions of this act pertaining to restrictions will be found in sections 19, 20, 22 and 23.

Section 19 provides:

> "That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands *allotted to him* for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, *be removed by Act of Congress;* and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior."

This section applies to restriction against alienation by the *allottee*, and prohibits the alienation for a period of twenty-five years from the approval of the act, and takes away from the Secretary of the Interior the authority conferred upon him by the Act of April 21, 1904, to remove restrictions against alienation.

Section 22 removed restrictions from the sale of inherited lands without regard to the degree of blood of the allottee, requiring, however, the approval of the Secretary of the Interior to all conveyances made by full-blood Indian heirs. That is to say, the mixed-blood adult heirs of a deceased full-blood Indian allottee could sell, but full-blood Indian heirs could not alienate allotments inherited by them without the approval of the Secretary.

—*Tiger* v. *Western Investment Co.*, 221 U. S. 286.

Section 23 provides that every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *provided*, that no will of a *full-blood Indian* devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner. Thus, every mixed-blood Indian could devise, and therefore alienate by will, his own allotment or inherited allotments, and although full-bloods could do likewise, yet the will of a full-blood devising his own allotment or an inherited allotment was invalid if it disinherited the parent, wife, spouse or children, unless acknowledged before and approved by a judge of the United States Court or a United States Commissioner.

This Act of April 26, 1906, was the first act undertaking to provide a uniform restriction against alienation by citizens of all the tribes. This act superseded the various restrictions against alienation by full-blood Indian allottees imposed by the provisions of the respective agreements with the different tribes. *This uniformity, however, applied only to full-blood Indians.* After the approval of this act the lands of full-bloods in all the tribes were under exactly the same restrictions against alienation. No full-blood could alienate the land allotted to him (section 19) for a period of twenty-five years after the approval of the act, and no full-blood heir could alienate the allotment inherited by him (section 22) at any time without the approval of the Secretary of the Interior. The only change with respect to mixed-blood citizens is that part of section 22 authorizing mixed-blood heirs to convey lands inherited by them. *The allotments of all mixed-bloods remained under the various restrictions imposed by the respective agreements.*

Act of May 27, 1908.
(35 St. L. 312.)

In order to understand the scope and effect of this act it is well to epitomize the conditions then existing in the various tribes. This act is general and applies to all the tribes, but the condition with respect to alienation by mixed-bloods being still different in the respective tribes, and Congress not

intending to impose restrictions against any land from which restrictions had been removed, inserted in the first section of this act, that being the section defining restrictions, the declaration that "*nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.*"

The first general Act of Congress passed after the various agreements had been ratified by the respective tribes and Congress, affirmatively removing restrictions from allotted lands was the act of April 21, 1904 (33 St. L. 189), and this removed restrictions from the alienation of surplus allotments by adult citizens not of Indian blood. It did not remove restrictions from alienation by mixed-blood Indians. Neither did the Act of April 26, 1906 (34 St. L. 137), remove restrictions from the allotments of mixed-bloods. It did authorize mixed-blood heirs to sell inherited lands, and that is all.

Cherokee.

No patents having been issued in the Cherokee Nation prior to September 30, 1905, the five-year restriction against alienation imposed by section 15 of the Cherokee Agreement, as held by the United States Circuit Court of Appeals for the Eighth Circuit in *Truskett* v. *Closser*, 198 Fed. 835, and in *Allen* v. *Oliver*, 31 Okla. 356, had not been removed at the time the Act of May 27, 1908, became operative, to-wit, July 27, 1908. That is to say, on May

27, 1908, none of the mixed-blood Cherokees, one-half, three-quarter or more, had power to alienate either their homesteads or surplus allotments, and consequently the restrictions on the lands of three-quarter-blood Cherokees, as well as all other mixed-blood Cherokees, *had not been removed by or under any law prior to the passage of the Act of May 27, 1908.*

Seminole.

Likewise, in the Seminole Nation, none of the patents having been delivered, or issued, or dated, at the time the Act of May 27, 1908, was passed (and in fact not yet delivered) the restrictions against the alienation of lands of Seminole half-bloods, three-quarter-bloods, or other mixed-bloods, had not been "removed * * * by or under any law prior to the passage" of the Act of May 27, 1908.

Choctaw and Chickasaw.

All homesteads of Choctaw and Chickasaw mixed-bloods, including three-quarter-bloods, were inalienable at the time the Act of May 27, 1908, was passed, and no patents having been issued in the Choctaw-Chickasaw Nations until along in 1905, it must be true that three-fourths of the surplus allotments of *all* Choctaw and Chickasaw mixed-blood citizens, half-bloods, three-quarter-bloods and other mixed bloods, was inalienable at the time the Act of May 27, 1908, was passed and in a number of cases all

the allotment was still restricted on account of the patent not being issued a year or more prior to the Act of May 27, 1908.

Creek.

The Government admits there were no restrictions on the surplus lands of mixed-blood Creeks, that is, three-quarter-bloods and other mixed-bloods, from and after August 8, 1907, and that for nearly twelve months prior to the passage of the Act of May 27, 1908, Moses Wiley, the allottee in this case, a duly enrolled three-quarter-blood Creek Indian, had full right to alienate his surplus allotment. The only restrictions against alienation by mixed-blood Creeks still in existence at the time the Act of May 27, 1908, was passed were those restraining the alienation of the homestead forty acres.

ARGUMENT

Being thus advised as to the conditions existing at the time Congress passed the Act of May 27, 1908, its analysis and interpretation seems clear and simple. At first, as provided in the various tribal agreements, restrictions against alienation were imposed without distinction as to degree of blood, even those citizens of non-Indian blood being likewise restrained. The *policy* of Congress was to hold and continue the restrictions on full-blood lands, both allotted and inherited. But as to those of non-Indian blood and mixed-blood Congress clearly pursued a very different policy down to the Act of May 27, 1908. Up to that act Congress had been removing restrictions from the land of non-Indian and mixed-blood citizens without regard to the fractional quantum of Indian blood. The Act of April 21, 1904 (33 St. L. 189), had removed all restrictions from the lands of adult citizens not of Indian blood, except the homesteads. The Act of April 26, 1906 (34 St. L. 137), section 22 thereof, removed restrictions from lands inherited by mixed-bloods, and although extending the restrictions against alienation by full-blood heirs and allottees (sections 19 and 20) nowhere is there any indication of an intention to extend restrictions against the lands of mixed-blood citizens. The Act of April 26, 1906, is the most elaborate legislation since the Curtis Bill of 1898.

Further, at that very time the Enabling Act, approved June 16, 1906, providing for the organization and admissions of the Indian Territory (which was nothing more than the Creek, Cherokee, Choctaw, Chickasaw, Osage and Seminole Indians) and Oklahoma Territory, as the State of Oklahoma, was before Congress for consideration. Again, Congress knew that within less than sixteen months after the approval of the Act of April 26, 1906, all the restrictions against the alienation of lands of mixed-blood Creeks (three-quarter-bloods included) would be removed under the provisions of section 16 of the Supplemental Agreement. At that time, however, the lands (homesteads and surplus) of mixed-blood citizens of the Seminole, Cherokee, Choctaw and Chickasaw Nations were under restrictions and would continue under restrictions for several years, the expiration thereof being regulated in each individual case by reference to the date of the issuance of the patent. In this light examine the Act of May 27, 1908.

Point One

This act expressly disclaims any intention to impose restrictions against the alienation of lands then free from restrictions, whether allotted to full-bloods, mixed-bloods or citizens not of Indian blood; or, in the exact language of the act: "Nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

The Government contends that the declaration "Nothing herein shall be construed to impose restrictions removed from *land* by or under any law prior to the passage of this act" applies only to three classes, to-wit: *(a)* Lands upon which restrictions were removed by the general terms of the Act of April 21, 1904; *(b)* The lands of those very few persons from which restrictions were removed by reference to their names in two or three Indian Appropriation Bills; *(c)* The lands of those citizens from which restrictions had been removed by the Secretary of the Interior under the authority conferred upon him by the Act of April 21, 1904.

We contend that by this clause in this section Congress expressly disclaimed any intention to impose restrictions upon the surplus lands of three-quarter-blood Creeks, the restrictions on their surplus lands having been removed by lapse of time under section 16 of the Supplemental Creek Agreement. If we be wrong in this construction

and the act undertakes to impose restrictions against the alienation of land free from restraint at the time the act was passed, then it must be admitted that the act is subject to grave constitutional objections, or at least that the constitutionality of the act in that particular is open to grave doubt. All three-quarter-blood Creeks were at that time not only citizens of the United States, but full fledged citizens of the State of Oklahoma, vested with full legal and equitable title in fee and possessed of full power to alienate, and being such citizens possessed of full power to alienate, any Act of Congress undertaking to prohibit such citizens from contracting with respect to their land must be of doubtful constitutionality. Congress no doubt realized this and for that very reason disclaimed any intention to impose restrictions against the alienation of land free from restraint at the time the act was passed. At that very time the constitutionality of the Act of Congress of April 26, 1906, sections 19 and 22 thereof, extending and continuing existing restrictions against alienation for a longer period of time than originally imposed, was earnestly denied in the case of *Marchie Tiger* v. *Western Investment Company*, and that question was not decided by this court until May 15, 1911, although that case was argued on November 30 and December 1 and 2, 1910, and re-argued March 1 and 2, 1011. Not only was the constitutionality of the Act of April 26, 1906, earnestly denied by counsel in that case, but, like-

wise, denied by distinguished members of Congress and the Senate.

On June 30, 1906, the Senate of the United States authorized the appointment of a select committee consisting of five senators under a Senate resolution as follows:

> "*Resolved*, that a select committee consisting of five senators be appointed to duly investigate all matters connected with the condition of affairs in the Indian Territory in relation to legislation included in the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes, approved April 26, 1906, and kindred matters in said territory with reference to the Five Civilized Tribes. And that said committee be authorized to employ a stenographer to report its hearings and all necessary clerical assistance. And said committee is authorized to sit in the City of Washington and in the Indian Territory or elsewhere, as circumstances may demand, with power to send for persons and papers and to administer oaths, and shall make full and complete report, together with their conclusions and recommendations, to the Senate of the United States, on the first Monday in December, *Anno Domini*, nineteen hundred and six. The necessary expense of said committee shall be paid out of the contingent fund of the Senate'."

Under said resolution the President of the Senate appointed a committee as follows: Senator C. D. Clark, of Wyoming, chairman; Senator Chester I. Long, of Kansas; Senator Frank B. Brandegee,

of Connecticut; Senator Henry M. Teller, of Colorado, and Senator William A. Clark, of Montana. The committee organized at Denver, Colorado, on August 10, 1906, and on November 12, 1906, met at Kansas City, Missouri, and at once proceeded to Indian Territory, where public hearings were held at Vinita, Muskogee, McAlester, Ardmore, Tulsa and Bartlesville.

In their report and recommendation to the Senate we find the following references and recommendation by said committee relative to the restrictions upon lands of the Five Civilized Tribes:

> "By the Act of March 3, 1901, all Indians in Indian Territory were made citizens of the United States. The Indian tribes had title to these lands by patents from the United States. These lands were occupied in common by the members of the respective tribes. By the Supplemental Agreements made in 1902 these Indians agreed to take their lands in severalty upon condition that they could alienate their allotments within a certain period, which differed in the several tribes. We believe that Congress might shorten this period and permit alienation at an earlier date.
>
> "Congress, by the Act of April 21, 1904, removed the restrictions upon the alienation of all allottees of either of the Five Civilized Tribes who were not of Indian blood, except minors, and except as to homesteads, and provided that restrictions upon the alienation of all other allottees, except minors, and except as to homesteads, might, with the approval of the Secre-

tary of the Interior, be removed upon application to the Indian Agent at the Union Agency.

"Section 19 of the Act of April 26, 1906, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes should have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the approval of that act, unless such restrictions, prior to the expiration of said period, shall be removed by Act of Congress.

"*We believe that this last legislation was unwise, injurious to the Indian, and of no validity.* Congress, after providing in the Supplemental Agreements that all the lands allotted to the citizens of the different tribes should be alienable within certain periods, could not, without the consent of the Indians, extend the time in which the lands could not be alienated and add to the restrictions imposed by the Original Agreements. The effect of this legislation has already clouded, and, if unrepealed, will continue to cloud the title of much land in Indian Territory, and will result in endless litigation. (Italics ours.)

"It will prevent the Indians from obtaining a fair price for their lands, and has been and will continue to be a fruitful source of dishonest transactions.

"It will not prevent sales being made at the expiration of the periods designated in the Supplemental Agreements, and has already resulted in contracts being made for such sales. This provision is generally considered to be invalid and should be repealed." (Report of select committee to investigate matters connect-

ed with the affairs in Indian Territory, 1906, Vol. 1, page v.)

We suggest that the elementary rule of interpretation is "that where there are two possible constructions of a statute, one of which will give rise to grave doubt as to its constitutionality and the other avoids such question, the latter will be adopted."

—*U. S.* v. *Bennett*, 232 U. S. 303.

In construing the act the implication must always exist that no violation of the Constitution was intended by Congress. That Congress did not intend to impose restrictions upon lands of three-quarter-blood Indians which were at that time free from restrictions is clearly evidenced by the following:

A.

At no prior time in the history of the relations between the Federal Government and the Indians had Congress ever attempted to impose restrictions against the alienation of land allotted to Indians where the legal and equitable title was vested in the Indian and the land free of restrictions and the Indian was a citizen of the state and the United States. If Congress by this act intended to prohibit the alienation of lands free from restrictions at the time the act was passed, then this is the first act of that character. It seems clear that if Congress had intended to enact such a radical measure,

one so at variance with its former policy, some mention would have been made thereof in the title to the act. The title to the act is: "An Act for the Removal of Restrictions From Part of the Lands of Allottees of the Five Civilized Tribes, and for Other Purposes." It is a settled principle of statutory construction that when a statute, or a portion thereof, is ambiguous, the title of the act should be looked to as an aid in its construction and interpretation.

In *U. S.* v. *Fisher et al.*, 2 Cranch 358 (2 L. ed. 304), the court said:

> "Where the mind labors to discover the design of the legislators, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration."

In *U. S.* v. *Palmer*, 3 Wheat. 610 (4 L. ed. 471), the court said:

> "The title to an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislators."

And in *Smythe* v. *Fiske*, 23 Wall. 374 (23 L. ed. 47), the court said:

> "Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction."

The gist of the foregoing decisions is, that when a statute is clear and unambiguous, the title cannot control the plain wording and expression; but where the statute is ambiguous, then the title should be

looked to, and consideration be given it in determining the legislative intent. Where two separate conflicting constructions of an ambiguous section are urged, one antagonistic and repugnant to the title, the other in exact accordance with the title, then the latter we submit should be followed and given effect.

Now the Act of Congress approved May 27, 1908, is not entitled "An Act to Impose Restrictions," but is entitled "An Act for the Removal of Restrictions." The decision of the District Court holds that the act did impose restrictions on the alienation of the lands of three-quarter-blood Creek Indians, from which the restrictions had theretofore been removed by the provisions of the very law imposing them. That construction is absolutely repugnant to the title to the act.

B.

In the Government's brief it is claimed that Congress by the Act of May 27, 1908, found as a fact that all three-quarter-bloods were incompetent, except those from whose lands the Secretary had removed restrictions in whole or in part, or Congress had removed them by name in one of the Appropriation Acts, or by general affirmative act, that is, the Act of April 21 1904.

Now if Congress intended to find that all mixed-bloods of three-quarter or more Indian blood were incompetent except those now named in the brief

for the Government, it is most remarkable that the taking effect of the act was postponed for sixty days from the date of the same. The first section of the act says: "That from and after sixty days from the date of this act the *status* of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as *regards restrictions on alienation or incumbrance*, be as follows:" The Government admits that the surplus allotment of Moses Wiley, and the surplus lands of all other three-quarter-blood Creeks and of mixed-blood Creeks, had been free from restrictions for nearly a year prior to the passage of this act, and if Congress found it necessary to protect three-quarter-blood Creeks the operation of the act would not have been suspended for sixty days. The construction insisted upon by the Government is absurd and unreasonable in that it assumes that after Congress found that three-quarter-bloods (then free from restrictions) were incompetent, it advertised their incompetency and left them unprotected and subject to be plundered for sixty days thereafter. In other words, Congress, according to the Government, said that all the three-quarter-blood Creeks are incompetent, but you may, for sixty days after the passage of this act, proceed to buy their surplus lands *and deal with them as fully competent to contract and convey.* The first section says: "That from and after sixty days from the date of this act the *status of the lands* * * * as regards restrictions on aliena-

tion or incumbrance, be as follows:" *What lands?* In the light of the title declaring the act to be "An Act for the Removal of Restrictions," etc., the *lands* referred to "as regards restrictions on alienation or incumbrance" must have reference alone to lands then under existing "restrictions on alienation or incumbrance." Lands then under restrictions were the only lands the *status* of which the act undertook to fix. The words "as regards restrictions on alienation or incumbrance" clearly implies existing restrictions and those existing restrictions are the ones the act dealt with. It removed *them* as to some lands and continued them as to others. It created no new class of restricted lands.

C.

The act clearly discloses the intention of Congress to relieve certain lands of existing restrictions and to continue an existing status and not to create an entirely new one. The clause imposing restrictions against the alienation of lands of three-quarter or more Indian blood, had at that time a wide field for operation as an extension and continuance of existing restrictions.

As pointed out in the earlier part of this brief, all mixed-bloods, including those of three-quarter-blood and more, in the Cherokee and Seminole Nations, were still under the restrictions originally imposed by the treaties, and, likewise, the lands of

Choctaw and Chickasaw mixed-bloods (including three-quarter-bloods) were at the time the act went into effect under the restrictions against alienation imposed by their agreements with the exception of one-fourth of the surplus of a few allottees. Thus, the act continuing restrictions on mixed-bloods of three-quarter or more Indian blood had a wide field for operation. But we contend it has no application in the Creek Nation. There are other clauses in the act, section one thereof, which certainly have no application to the Creek Nation. It says "All *lands*, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions." This has no application whatever in the Creek Nation, except as to homesteads and minors. The next clause provides "All *lands*, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarter Indian blood shall be free from all restrictions." *This clause has no application whatever in the Creek Nation*, for the reason that all lands freed from restrictions by this clause had been free from restrictions since August 8, 1907. Congress passed the act in general terms leaving its application to be worked out in connection with the prior laws and in no way did it change the status of mixed-blood Creeks. The clause last quoted did not remove restrictions from the surplus of mixed-

blood Creeks "having half or more than half and less than three-quarter Indian blood," because there were no restrictions then to remove.

D.

The trial court based its decision in this case upon its former opinion in *United States* v. *Schock, Treasurer*, 187 Fed. 871. That was a suit brought by the United States against Schock, County Treasurer of Okmulgee County, Oklahoma, to restrain him from listing the surplus lands of three-quarter-blood Creek Indians for taxation.

Section 4 of the Act of May 27, 1908, says:

> "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes," etc.

Acting on the generally accepted opinion that the Act of May 27, 1908, did not impose restrictions upon lands free from restrictions at the time the act was passed, the taxing authorities listed the surplus lands of three-quarter-blood Creeks for taxation. The trial court held that while those lands were alienable from August 8, 1907, to July 27, 1908, yet, section one of the Act of May 27, 1908, imposed restrictions against their alienation, and that consequently the lands were not subject to taxation. An injunction was granted, and that case is now pending in the United States District Court for the

Eastern District of Oklahoma awaiting the final outcome of this case in this court. In the brief of the Government frequent reference is made to that decision. After quoting the first section of the Act of May 27, 1908, the learned trial judge said:

> "The lands particularly referred to in the second ground argued in the demurrer are the surplus allotments of those allottees who are enrolled on the Creek roll as having three-fourths Indian blood, or more, and less than full-blood. It is contended by the defendant that these lands are taxable, *first*, because it was not intended by the Act of May 27, 1908, to reimpose restrictions upon them; and, *second*, that if it was so intended, Congress was powerless to do so. On August 8, 1907, the restrictions on this class of Creek lands expired by limitation, and from that time until May 27, 1908, there was no restriction upon their alienation. The surplus allotments of this class of allottees are, however, clearly included within the lands mentioned in that portion of the act above quoted as not being subject to alienation prior to April 26, 1931. In the same section, and immediately following the language above quoted, is this sentence:
>
> > 'The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.'
>
> "It is contended by the defendant that one of the laws referred to as removing restrictions prior to the passage of this act is the Creek

> Supplemental Agreement, by the terms of which the restrictions on this class of land expired on August 8, 1907. * * * While the meaning of this sentence is not as clear as it might well have been made, I am of the opinion that it applies only to restrictions theretofore removed by the Secretary of the Interior, under authority of law, and to restrictions removed by such Acts of Congress as had heretofore been passed for the purpose not of imposing, but of removing, restrictions. Before restrictions can be removed, they must have been imposed by prior legislation, and, in my opinion, the only laws referred to as removing restrictions, are those which Congress has passed *positively removing certain restrictions either by special or general legislation.* It does not have the effect of excepting Creek allottees, less than full-blood, and of three-quarter-blood or more, from the operation of the act." (187 Fed. 871.)

We respectfully insist that, in this opinion, the court gave an entirely unwarranted construction and interpretation of the clause: "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." The interpretation given by the lower court, and contended for by the Government in this case, is painfully narrow, and is based solely on a play on the word "removed," and necessitates importing into the clause other words; and further necessitates the use of the language of the learned judge below in the *Schock* case cited, to-wit: removed from land by or under any law "*which Con-*

gress has passed positively removing certain restrictions either by special or general legislation." We submit that in interpreting and in construing this section, no addition or substraction is necessary. The learned court below says, in substance, that this clause had reference solely to removal of restrictions by the Secretary of the Interior and by affirmative legislative enactments passed subsequent to the allotment acts or treaties; and that the clause had no reference to restrictions removed by the terms and provisions of the very law imposing them. Had this been the legislative intent it would have been so expressed. In *Choate* v. *Trapp*, 224 U. S. 665, decided by this court on May 13, 1912, the court recognized that the restrictions against alienation of these lands were removed by the terms of the Creek Supplemental Agreement as well as by the Secretary of the Interior, or by affirmative general or special legislative enactment. In that case, the court considered and construed several sections of the Choctaw-Chickasaw Agreement, and in its opinion said:

> "The exemption and non-alienability were two separate and distinct subjects. One conferred a right, and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for 16 years longer, if the Indian retained title during that length of time. Restrictions on alienation were *removed* by lapse of time. He could sell part of it in one year, a part after three years, and all after five years."

Further, it has been repeatedly held by this court, that the agreements between an Indian tribe on the one hand and the United States Government on the other, are in no sense contracts or treaties; that they derive their efficacy solely by congressional enactment, and are only Acts of Congress and fall within the meaning of the word "law," as used in the Act of May 27, 1908, heretofore quoted.

In *Redbird* v. *U. S.*, 203 U. S. 76, 93, the court, in referring to the Cherokee Treaty approved July 1, 1902 (32 St. L. 716), said:

> "Counsel for claimants speak of the Act of 1902 as a 'treaty,' but it is only an Act of Congress and can have no greater effect."

In *Gritts* v. *Fisher*, 224 U. S. 640, decided by this court on May 13, 1912, the court again, in referring to the so-called Cherokee treaty, said:

> "The difficulty with the appellant's contention, is that it treats the Act of 1902 as a contract, when 'it is only an Act of Congress and can have no greater effect,' which was but the exertion of the administrative control of the government over the tribal property of the tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued."

To the same effect are:

Thomas v. *Gay*, 169 U. S. 271;
Lone Wolf v. *Hitchcock*, 187 U. S. 565.

Therefore we submit that, when in the Act of Congress approved May 27, 1908, it was provided that the act should not be construed to impose re-

strictions removed "by or *under* any law prior to the passage of this act," reference was had to the removal of restrictions under the Supplemental Creek Agreement "by lapse of time;" that is, the expiration of the five-year limitation contained in the Act of June 30, 1902, as well as removals by the Secretary of the Interior or by general or special affirmative legislation.

We believe that from the foregoing discussion, it will become obvious to the court that the solution of the question under consideration revolves around the words "removed from land by or under any law prior to the passage of this act."

We have just shown that the Supplemental Creek Agreement approved June 30, 1902, is a "law," and we may therefore eliminate the word "law" from further consideration. The words "by or under any law" are not, as contended by the Government, equivalent to "by the Secretary of the Interior," because the Secretary is not the law, and the word "law" is not synonymous with the word Secretary. The words "removed by or under any law prior to the passage of this act," are not equivalent to saying "removed by or under any new law passed by Congress since the restrictions against alienation were imposed," or, in the language of the learned trial judge below in the *Schock* case, "removed by or under any law which Congress has passed positively removing certain restrictions, either by special or general legislation."

We have been unable to find decisions construing the words "by or under any law." If Congress intended to limit the exemption to that class of lands from which restrictions had been removed by a general or special Act of Congress subsequent to the imposing of restrictions by the treaty terms, it seems unreasonable to contemplate that Congress would have used any other words than substantially the following: "And nothing herein shall be construed to impose restrictions removed from land by the Secretary of the Interior, or any subsequent general or special Act of Congress." The Government contends that the only removal "under any law" is removal by the Secretary, whereas, we contend that removal by time, as provided for in section 16 of the Supplemental Creek Agreement, is clearly a removal "under" a law, and just as much so as a removal by the Secretary. It certainly is strange that Congress left this in doubt, if it intended to limit the exempted class falling under removal "under any law" to that class from whose lands the Secretary had removed restrictions; it would have been so easy to have referred to removal by the Secretary.

In *Risley* v. *Village of Howell*, 64 Fed. 457, the Circuit Court of Appeals for the Sixth Circuit said:

> "To say that a thing is done 'under and by the authority' of a statute referred to is equivalent to saying that it is done *in conformity with it*, and authorized by it."

In *Stoddard* v. *Chambers*, 2nd Howard 284, 317, the Supreme Court, in speaking of a statute which excluded from its operation location of lands previously made "under a law of the United States," said, "Now, an act under a law, means in conformity with it, and unless the location of the defendant shall have been made agreeably to law," he is not within the exception.

It is a well settled proposition of statutory construction that where the same word is used by a legislative body in different portions of an act, or in different acts in *pari materia*, that it will be understood that the legislature intended to use the same word in the same sense throughout the act, or throughout the several acts. This principle is laid down by Black on Interpretation of Law, in this wise:

> "When the legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislation on the same subject matter, it will be understood as using the word in the same sense, unless there is something in the context, or in the nature of things, to indicate that it intended a different meaning thereby."
>
> —Black on Interpretation of Law, page 205;
>
> Sutherland Stat. Constr., 2nd ed., Vol. 2, Sec. 358;
>
> Endlich Stat. Interp., Secs. 53 and 370;
>
> *Sheehan* v. *L. & R. Co.*, 101 S. W. Rep. 380;
>
> *Collins Co.* v. *Hadley*, 78 N. E. Rep. 353.

Again, turning to section 4 of the Act of May 27, 1908, we find the following:

> "That all land from which restrictions have been or shall be *removed*, shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, that allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing *prior to the removal* of restrictions, other than contracts heretofore expressly permitted by law."

The above section declared that "all land from which restrictions *have been or shall be removed*, shall be subject to taxation and all other civil burdens," etc.

If the narrow construction insisted upon by the Government be correct, then land from which restrictions had been removed under prior law by lapse of time would not fall in the class of lands Congress hereby intended to declare subject to taxation. Certainly so narrow a construction was never contemplated by Congress.

Section 4 further provides that allotted lands shall not be subjected or held liable to any form of personal claim or demand against the allottee arising or existing prior to the *removal of restrictions* other than contracts heretofore expressly permitted by law.

According to the Government's contention this clause would have no application to three-quarter-

blood Creeks, because restrictions had not been removed by the Secretary of the Interior or some special Act of Congress designating the allottees by name.

Section 5 of the Act of May 27, 1908, however, throws more light on the question. That section provides:

> "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made *before or after* the approval of this act, which affects the title to the land allotted to allottees of the Five Civilized Tribes *prior to removal* of restrictions therefrom, and also any lease of such restricted land made in violation of law *before* or after the approval of this act shall be absolutely null and void."

Now this section five expressly declares absolutely null and void any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney or other instrument "made *before* or after the approval of this act which affects the title to the land allotted to allottees of the Five Civilized Tribes *prior to removal* of restrictions therefrom."

The position of the United States in this case clearly leads to the following situation:

Let us assume that a three-quarter-blood Creek executed for a valuable consideration a deed conveying his surplus allotment on August 10, 1907, or on May 1, 1908; said deed was, at that time, unquestion-

ably valid and binding on the allottee, because there were no restrictions against the alienation of his surplus allotment; and the vendee had a valid, legal and enforceable title. If the contention of the Government be sound, the restrictions formerly against alienation of the land of the three-quarter-blood Creek had *not been removed*. In other words, there had, prior to the Act of May 27, 1908, section five thereof, been no "removal of restrictions therefrom," that is, from the land of the three-quarter-blood Creek, Moses Wiley, the allottee in this case, we will say. The Secretary of the Interior had not removed the restrictions. Neither had they been removed by special Act of Congress. The Government, therefore, would argue that there having been no "removal of restrictions therefrom," this section five of the Act of May 27, 1908, expressly declares said deed to be absolutely null and void. In other words, if the contention of the government that the expiration of restrictions by limitation of time is not a *removal* of restrictions be sound and correct, then we will have the following absurd syllogism:

First Premise. A three-quarter-blood Creek, against the alienation of whose surplus allotment the restrictions had expired by limitation of time under section sixteen of the Supplemental Creek Agreement, executed a deed of conveyance for a valuable consideration prior to the Act of May 27, 1908, but after August 8, 1907.

SECOND PREMISE. Prior to the Act of May 27, 1908, there had been no "removal of restrictions therefrom"—that is, from the surplus of the three-quarter-blood Creek.

CONCLUSION. Such deed under section five of the Act of May 27, 1908, declaring any "deed, mortgage, contract to sell," etc., * * * "made *before* or after the approval of this act * * * and prior to *removal* of restrictions therefrom" is "absolutely null and void."

This needs very little further comment. If such is the effect of section five of the Act of May 27, 1908, then the section is unconstitutional and void.

A deed executed by a three-quarter-blood Creek after August 8, 1907, and prior to May 27, 1908, is valid, and has at all times been valid and operated to divest the title out of the Indian and vest it in the purchaser, and Congress has no authority or power to legislate the title out of such purchaser. This is so obvious that no citation of authority is necessary. However, see the language of Mr. Justice LAMAR in *Choate* v. *Trapp*, 224 U. S. 677. Such legislation being absolutely unconstitutional and void, it is the duty of the court to construe the act in such way as to avoid its unconstitutionality, if the language of the act is capable of a construction leaving the act constitutional. It was never the intention of Congress, by section five of the Act of May 27, 1908, to declare null and void, deeds executed by

three-quarter-blood Creeks between August 8, 1907, and May 27, 1908, and yet if the word "removal" does not include within its meaning and scope the removal of restrictions by limitation of time *under the law*, that is, section 16 of the Supplemental Creek Agreement, then we have a clear declaration by Congress in section five, that all deeds executed by three-quarter-blood Creeks at any time prior to May 27, 1908, are absolutely null and void.

E.

The construction insisted upon by the Government is unreasonable, unjust and infringes upon the rights of the State of Oklahoma to subject the surplus allotments of mixed-blood Creeks of three-quarter blood and over, to assessment for taxation before April 26, 1931.

Admitting for the sake of argument at this place that Congress had the power after statehood to prohibit the alienation and taxation of lands prior thereto free from restraint, we urge that unless the intent of Congress to exercise such power is clearly manifested the court should reject the construction insisted upon by the Government.

The Enabling Act providing for the organization and admission of Oklahoma as a state was approved on June 16, 1906. It will not be denied by the Government that under the provisions of the Original and Supplemental Creek Agreement the

surplus allotment of all Creek citizens, irrespective of degree of blood, became subject to taxation on and after August 8, 1907. The Act of Congress of April 26, 1906 (34 St. L. 137), section 19 thereof, extended the restrictions against alienation by full-blood allottees for a period of twenty-five years, and thus exempted the allotted lands of ~~full-blood~~s from taxation for that period.

—*Blue Jacket* v. *Commissioners*, 5 Wallace 737;

Yellow Beaver v. *Board of Commissioners*, 5 Wallace 757;

Fellows v. *Denniston*, 5 Wall. 761;

United States v. *Rickert*, 188 U. S. 433 (47 L. ed. 532).

The forty-acre homestead of each Creek, irrespective of his blood, was made non-taxable by section 7 of the Original and section 16 of the Supplement Agreement for twenty-one years from the date of the patent.

Congress knew that a state could not well exist without the power to tax, and, further knew that the restrictions upon the surplus one-hundred and twenty acres of all mixed-blood Creeks would end on August 8, 1907, and on the admission of the state become subject to state taxation. Oklahoma was admitted into the Union on November 16, 1907, and the right and power to tax the surplus allotments of all mixed-blood Creeks immediately vested in the state. The right and power to tax the allotments of

mixed-blood citizens in the Seminole and Cherokee Tribes never at any time vested in the state prior to the Act of May 27, 1908, and neither did any part of the allotments of Choctaw and Chickasaw mixed-bloods become subject to state taxation prior to the Act of May 27, 1908, ~~except possibly a fourth interest in the surplus of a part of the allottees.~~

Now section 1 of the Act of May 27, 1908, upon which the Government relies, says:

> "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degree of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarter or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, *or any other incumbrance,* prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the Interior may remove such restrictions,* wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Unless the surplus allotments of mixed-blood Creeks of three-quarter or more Indian blood then free from restrictions and subject to state taxation fall within the exception provided for in the next sentence declaring that "nothing herein shall be construed to impose restrictions removed from

land," etc., then Congress, without the consent of the state, deprived the state of its power to tax these surplus Creek lands. And we earnestly urge that such intent should not be imputed to Congress unless clearly manifested, for the reason that such is a gross injustice to the state. It will be said that we cannot raise this question because we do not represent the state, but we have the right to refer to it as a consequence following the Government's construction.

Sutherland on Statutory Construction, Vol. II, p. 910, Sec. 488, says:

> " 'In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the *existing rights of the public*, or of individuals be not infringed.' Considerations of what is reasonable, convenient, or causes hardship and injustice, have a potent influence in many cases. It is always assumed that the legislature aims to promote convenience, to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a flagrant departure from this aim, it will not be adopted if any other is possible by which such pernicious consequences can be avoided. In *Queen* v. *Clarence*, Lord COLERIDGE, C. J., observed that: 'In such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opin-

ion good reason for believing that the construction which leads to such results cannot be the true construction of the statute'."

The same authority, Vol. II, Sec. 490, says:

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; *to favor public convenience, and to oppose all prejudice to public interests.*"

The condition in the Creek Nation was entirely different from that existing in the Choctaw and Chickasaw Nations, as shown by the opinion of this court in *Choate* v. *Trapp*, 224 U. S. 665. *All allotted lands* of Choctaws and Chickasaws under the Atoka Agreement (30 St. L. 495, 507, Sec. 29), were made non-taxable while the title remained in the original allottee not to exceed twenty-one years from the date of the patent, and this exemption from taxation therefore existed for sixteen years longer than the period of restrictions against alienation. Not so in the Creek Nation. All surplus lands were taxable after the restrictions were removed by the terms of section 16 of the Supplemental Creek Agreement.

There is no overwhelming paramount cause or reason for prohibiting the alienation of surplus lands of mixed-blood Creeks of three-quarter or more Indian blood.

By the Act of April 26, 1906, Congress extensively legislated on the subject of restrictions in the Five Tribes, and by then failing to continue then

existing restrictions against the alienation of surplus lands of mixed-blood Creeks, Congress necessarily found that they were competent to take care of their affairs, and for that reason made no provision for extending restrictions.

Upon the other hand, the withdrawal of surplus allotments of mixed-blood Creeks of three-quarter or more Indian blood from the state's power to tax inflicts a great injury upon the state. Under the decision of this court in *Choate* v. *Trapp, supra,* there are thousands of acres of valuable land in the Choctaw and Chickasaw Nations non-taxable for nearly fifteen years yet to come; and all the homesteads in all the tribes as well as the surplus allotments, of full-bloods and mixed-bloods of three-quarter and more Indian blood in the Cherokee and Seminole Nations are non-taxable for nearly twenty-five years yet to come.

With this vast area of non-taxable lands in Oklahoma the burden of taxation upon those who must bear it has been extremely onerous, and as a matter of fact some of the counties of this state in the Choctaw and Chickasaw Nations have almost been forced to give up their separate local government, and the abandonment of such counties though large in area and their consolidation with others has been seriously considered, and but for the difficulties placed in the way by the Oklahoma Constitution, no doubt several counties would be abandoned and consolidated with others.

Point Two

Assuming for argument that the Act of May 27, 1908, imposed restrictions against the alienation of lands of mixed-blood Creeks of three-quarter and more Indian blood, the act to that extent is unconstitutional and void.

The Government contends that the federal guardianship over the Indian in no way depends for its existence upon a particular restriction against the alienation of a particular piece of land. The Government's brief says that if the relations of the Indian to the Government were the same as those of the white man in every respect save for the bare existence of the restrictions upon his title, the restrictions could not be constitutionally enlarged without the Indian's consent, because being fully *sui juris* himself, his power to dispose of his allotment would be absolutely measured by the terms of his deed, "and any attempt to vary these terms would be a clear invasion of his property." The argument is based upon the decision of this court in *Tiger* v. *Western Investment Company*, 221 U. S. 286, sustaining the constitutionality of sections 19 and 22 of the Act of Congress of April 26, 1906, extending the period of then existing restrictions against alienation for the further period of twenty-five years. In the *Tiger* case this court held that in pursuance of the long established policy of the Government Congress has the exclusive right to de-

termine for itself when the guardianship ends. Mr. Justice DAY said:

> "It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

It is our contention that Congress determined this matter clearly and unmistakably when it made or allowed mixed-blood Creeks to become citizens of the State of Oklahoma, free at that time from all restraint against the alienation of their surplus lands. This is clearly indicated by the fact that Congress, well knowing that all the surplus lands of mixed-blood Creeks would be free from restriction at the time the State of Oklahoma would be admitted, proceeded to legislate elaborately in the Act of April 26, 1906 (34 St. L. 137), on the affairs of the Five Tribes. The title to that act is of some significance. It is "An Act to Provide for the *Final Disposition* of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes." If Congress had intended to retain supervision and control over the surplus lands of mixed-blood Creeks it is unreasonable to believe that it would have suffered the restricted period to expire without taking some action to extend it, especially in view of immediate statehood.

Congress, in section 16 of the Act of March 3, 1893 (27 St. L. 645), provided for the appointment of the Commissioners to the Five Civilized Tribes,

and in that very act announced and declared its purpose to bring about statehood for the Five Tribes. It was not merely statehood for the white people. It was not statehood for a certain territory inhabited by white people, in whose geographical limits Indian tribes existed on an Indian reservation or as tribal clans, *but it was statehood for the Indians themselves. And we maintain that when Congress authorized and admitted Oklahoma as a state it thereby released and ended its guardianship over all Indian citizens in so far as their unrestricted lands were concerned, and retained guardianship and jurisdiction for no other purpose than to wind up the tribal affairs of the Indian Nations.*

The point we make is, that no matter what constitutional authority Congress may possess to extend or impose restrictions prior to or after statehood, yet, after statehood Congress lost jurisdiction to legislate with respect to unrestricted lands, the legal and equitable title being vested absolutely in the Indian, the freedman, the mixed-blood and the intermarried white. The power of Congress to legislate in respect to unrestricted lands ended with statehood. Such power is incompatible with and repugnant to the constitutional status of an American state. Oklahoma was admitted on an equal footing with the original states, and Congress has no jurisdiction under the Constitution to restrain a citizen of a state from alienating his land or other property. Such legislation is beyond the jurisdic-

tion of Congress. *When Congress permitted the restrictions to expire prior to statehood it lost all control or supervision over such lands for the reason that the allottees, immediately upon the admission of the state, became citizens of the state and subject to all its laws.*

It is well here to examine the statehood bill and the dual citizenship existing in this country, to-wit: citizenship of the United States and citizenship of a state:

> "An act to enable the people of Oklahoma, and of the Indian Territory to form a constitution and state government, and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and state government, and to be admitted into the Union, *on an equal footing with the original states.*" (34 St. L. 267.)

It will be observed from this preamble that the *people* of the Indian Territory, composed of the Five Civilized Tribes, and the *people* of Oklahoma Territory, were to be enabled to form a constitution and state government, and become a part of the Union, "on an equal footing with the original states."

Section 3 of article 4 of the Constitution of the United States is as follows:

> "New states may be admitted by Congress into this Union, but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the

junction of two or more states or parts of states without the consent of the legislatures of the states concerned, as well as of the Congress."

There must be two things out of which to create a state and upon its creation out of these things Congress may admit it into the Union. These two things necessary to the creation of a state are, *first*, a defined territory; and, *second*, *people*. *No state can exist without territory, and no state can exist without citizens.* It is as impossible for a state to exist without the one as without the other. A territory cannot make a state out of individuals or people. People, however, may create a state out of territory. We mean in this connection by the word "territory" a geographical domain.

Therefore, the preamble states that the purpose of this act is to enable the *people* of a certain geographical domain to form a constitution and state government. Who were these people mentioned in the preamble? The enacting clause names them, as well as the body of the bill. The enacting clause is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the *inhabitants* of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory as at present described, may adopt a constitution and become the State of Oklahoma as hereinafter provided;"

The preamble uses the word "people" and the enacting clause uses the word "inhabitants." Section 2 more specifically describes and defines the people and inhabitants authorized to form a constitution and state government. It says:

> "That all male persons over the age of twenty-one years who are citizens of the United States, or *who are members of any Indian Nation or Tribe in said Indian Territory and Oklahoma*, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state; and all persons qualified to vote for said delegates *shall be eligible to serve as delegates;* and the delegates to form such convention shall be 112 in number, 55 of whom shall be elected by the people of the Territory of Oklahoma, and 55 by the *people* of the Indian Territory, and two shall be elected by the electors residing in the Osage Indian Reservation in the Territory of Oklahoma: * * *"

The Commissioner to the Five Civilized Tribes, and two judges of the United States Court for the Indian Territory, to be designated by the President, were constituted a board to apportion the Indian Territory into 55 districts, "as nearly equal in population as may be," and similar provisions were made for a board from the Territory of Oklahoma.

Section 3 is as follows:

> "That the delegates to the convention thus elected shall meet at the seat of government of

said Oklahoma Territory on the second Tuesday after their election, excluding the day of election, in case said day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and after organization, shall declare on behalf of the *people* of said proposed state, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized, to form a constitution and state government for said proposed state. The constitution shall be republican in form, *and make no distinction in civil or political rights on account of race or color*, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

As pointed out and expressly provided in section 3 above quoted, the constitution was required to be republican in form, "and to make no distinction in civil and political rights on account of race or color."

These citizens of the various Five Civilized Tribes, not only participated in said election, some of whom became delegates to the Constitutional convention, but hold offices of trust and emolument under the state government. That they have an aptitude, as well as a thirst for office, has been demonstrated by their eagerness to obtain the same, and by their competency to fill the positions. These very allottees over whom the government now claims the authority to enlarge and extend guardianship, were expressly empowered and authorized by the Enabling Act to form a constitution and state government,

serve as members of the constitutional convention, and to now without a trial and hearing, declare them by Act of the Legislative branch personally incompetent to manage their business affairs is certainly without precedent, and neither sustained by history nor supported by the Constitution. The humblest unfortunate is entitled to a trial and a hearing before he is adjudged incompetent and the management of his person or estate placed in the hands of a guardian.

—24 Cyc 1124.

When these people and inhabitants of the Five Civilized Tribes, which, territorially is the same as Indian Territory, co-operated with the people and inhabitants of the Territory of Oklahoma, exercised the authority conferred upon them by the Enabling Act, and under that authority formed a constitution and created a state, it must be admitted that they became citizens of the State of Oklahoma, *co instanti*, as well as citizens of the United States. They were denied the power under section 3 of the Enabling Act, to themselves form a constitution creating in law any distinction in civil or political rights on account of race or color, and we assert that the United States has no power either inherently or by reservation, to make any distinction with respect to the people and inhabitants of the State of Oklahoma in their civil and political rights on account of race or color. If the United States asserts such

power it must sustain the assumption thereof by the Constitution of the United States.

Citizenship in the United States and of a state is created either by birth or naturalization.

—*Elks* v. *Wilkins* 112 U. S. 101.

It has been well established and clearly recognized that a distinction exists between citizenship of the United States and of a state. A man may be a citizen of the United States, without being a citizen of a state. For instance, a citizen of the District of Columbia. To be a citizen of a state he must reside within the state.

—*Slaughter-House* cases, 16 Wallace, 73.

It is unnecessary to discuss the question as to whether or not there was any such thing as citizenship of the United States prior to the adoption of the fourteenth amendment. And we admit here and now that an Indian born a member of one of the Indian tribes within the United States, is not by reason of his birth within the United States, a citizen of the United States. But we assert that the Indians constituting the inhabitants of the Five Civilized Tribes are citizens of the United States and the State of Oklahoma.

—*Matter of Heff*, 197 U. S. 505;
United States v. *Hall*, 171 Fed. 214.

The fourteenth amendment to the Constitution does not make a citizen a voter, but simply clothes him with the capacity to become a voter. A citizen

has been defined to be "one who is a part of the nation or body politic of a sovereign state, owes allegiance to and may claim reciprocal protection from its government." While the word "citizen" is capable of more meanings than one it is not a convertible term with "inhabitant" or "resident;" women and minors may be citizens; hence, citizenship is not synonymous with elector or voter, although as a rule one who has the right to vote for civil officers and himself is qualified to fill elective offices, is a citizen.

—7 Cyc 133.

Another definition is:

"A constituent part of a sovereignty synonymous with people."

—Black's Law Dict.

Another:

"A member of a nation or a sovereign state, especially of a republic; one who owes allegiance to the government and is entited to protection from it."

—Standard Dictionary.

O'Connor v. *State* 71 S. W. 409.

"A member of a sovereign state, entitled to all its privileges." (And) "Where the two characteristics of allegiance and protection are found in their completeness and together, there citizenship exists."

—Black's Const. Law, page 524.

Blanck v. *Pausch*, 113 Ill. 60.

7 Cyc 143, says:

"The admission of a territory on an equal footing with the original states involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of Congress.'

The authority cites:

Boyd v. *Nebraska*, 143 U. S. 135;
Minneapolis v. *Beum*, 56 Fed. 576;
Bohuaud v. *Biz*, 105 Fed. 485;
Barrett v. *Kelly*, 31 Tex. 476;
Cryer v. *Andrews*, 11 Tex. 170;
Osterman v. *Baldwin*, 6 Wallace 116.

The members of the Five Civilized Tribes were not aliens by birth, nor citizens of the United States by birth. Their position was, therefore, anomalous prior to the granting of citizenship in 1901.

—*Tiger* v. *Western Inv. Co., supra.*

While Congress cannot enact a law regulating the local, internal and domestic affairs of a state, nor put in force in one state a law beyond its jurisdiction to put in force in another state, Congress did in the last sentence of section 21 of the Oklahoma Enabling Act provide that:

"The officers of the state government formed in pursuance of said constitution, as provided by said constitutional convention, shall proceed to exercise all the functions of such state officers; and all laws in force in the Ter-

ritory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

This was no more or less than a consent upon the part of Congress that the constitutional convention could put in force within the new state the laws of the Territory of Oklahoma. The Constitution did put in force the laws of the Territory of Oklahoma, but their operation and efficacy in the new state is by virtue of the Constitution and not by virtue of the Enabling Act.

Congress certainly had no jurisdiction to legislate about the procedure of a state court, marriage and divorce and other domestic affairs, and therefore we say that this was nothing more nor less than a consent upon the part of Congress that the state constitution might place in force in the state the Oklahoma Territorial laws. *Thus, Congress consented that all citizens of the state*, irrespective of race, *should be subject to the civil and criminal laws of the state*, and required as a condition to the state's admission, that it actually embody in its constitution a guarantee that the members of the tribes shall have all the civil and political rights of other citizens. Thus all the citizens of the state are entitled to all the civil and political rights possessed

by citizens of any other state, and this, irrespective of race or color as required by section 3 of the Enabling Act, which declared that "the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

A "civil right" is said by Anderson to be a right accorded to every member of a distinct community or nation, and Bouvier says: "Civil rights are those which have no relation to the establishment or management of the government. These consist in the power to acquire and enjoy property, and of exercising the paternal and marital powers, and the like." *People* v. *Barrett*, 203 Ill. 99, 67 N. E. 742, 743, 96 Am. St. Rep. 296.

The term "civil rights" or "means all those rights which the laws give a person, which depend upon the laws of the community in which he lives and of which he is a member." *Bowles* v. *Habermann*, 95 N. Y. 246, 247.

As defined by Bouvier, "civil rights are those which have no relation to the establishment, support, or management of government. These consist in the power of acquiring and enjoying property, of exercising the parental and marital power, and the like." They are the absolute rights of persons, the right of personal security, the right of

personal liberty, and the right to acquire and enjoy property as regulated and protected by law. They are the rights which, according to the fundamental principles of American government, are inalienable. *People* v. *Washington*, 36 Cal. 658-662.

Under section 2 of the Enabling Act all members of any Indian Nation or Tribe who have resided within the limits of the proposed state for the six months preceding the election were authorized to vote for and choose delegates to form a constitutional convention, and all persons qualified to vote (and this includes mixed-blood Creeks) were made eligible to the constitutional convention.

And, under section 3 of the Enabling Act prohibiting the state constitution from making any distinction in civil or political rights on account of race or color, it must follow that citizens of the Creek Nation, irrespective of their degree of blood, were recognized as eligible to any office from constable up to United States Senator.

In view of this it would certainly be beyond the power of Congress to after statehood, reclaim a former guardianship over the person of a citizen of the state, though he be of Indian blood, and by virtue of such personal guardianship prohibit such state citizen from alienating land otherwise free from restraint. *It must be true that the guardianship of the Federal Government over all Indians, in so far as their unrestricted lands are concerned,*

was extinguished by statehood. Otherwise, the power of the Federal Government knows no limits and no duration of time. One of our United States Senators is a mixed-blood Cherokee, and one of our Congressmen is a mixed-blood Choctaw. Many enrolled citizens by blood served in the constitutional convention, and have since statehood occupied high official positions of honor and trust. Can Congress now, either by general or special act, directly or indirectly, put them arbitrarily in a class and declare them incompetent to deal with their allotted lands? If so, Congress may now under the declaration of personal incompetency deprive them of the power to sell their live stock or buy and sell any property.

In a sense every state exercises a guardianship over its citizens, and likewise the Federal Government exercises a guardianship over its citizens, and this is all true irrespective of race or previous condition. But this guardianship does not draw to the Federal Government, or to the state, the power to interfere with vested property rights of individuals. *An Act of Congress is not due process of law.*

If Congress after statehood can prohibit a three-quarter-blood Indian, a citizen of the state, from alienating his land free from federal restraint at the time statehood intervened, then Congress can prohibit citizens not of Indian blood from alienating their lands, although the restrictions against aliena-

tion by that class were removed from the surplus lands of all adult citizens not of Indian blood by the Act of Congress of April 21, 1904.

It is our contention that when Congress once permitted the lands to become free from restraint, *and in addition thereto* authorized the organization of a state and such emancipated citizens to become citizens of the state guaranteed all the civil and political rights of white citizens, the power of Congress ended. And, unless the power is conferred upon Congress by the Constitution to legislate with regard to the private property of a citizen of a particular state where the lands of such citizen were free from restraint at the time statehood intervened, the power of Congress to prohibit mixed-bloods from alienating their land, as attempted by the Act of 1908, does not exist.

In discussing the powers of the Federal Government, Justice Woods, in *United States* v. *Harris*, 106 U. S. 629-644, said:

> "We pass to a consideration of the merits of the case. Proper respect for the co-ordinate branch of the government, requires the courts of the United States to give effect to the presumption that Congress will pass no act, not within its constitutional powers. This presumption should prevail unless a lack of constitutional authority to pass the act in question is clearly demonstrated. While conceding this, it must, nevertheless, be conceded that the government of the United States is one of delegated, limited and enumerated powers. *Martin* v.

Hunter, 1 Wheat. 304; *McCullough* v. *Moore*, 4 Wheat. 316; *Gibbons* v. *Ogden*, 9 Wheat. 1. Therefore, every valid Act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: Section 1 of the first article, declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with the grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.' Article 10 of the amendments to the Constitution declares that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively and to the people'."

Mr. Justice STORY, in his commentaries on the Constitution says: "Whenever, therefore, the question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is proper or incident to the expressed power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it." Citing sections 1243, Virginia Reports and Resolutions, January, 1800, pages 33-34; President Monroe's Exposition

and Message of May 4, 1822, page 47; 1 Tuck. Bl. Com. App. 287, 288; 5 Marsh. Wash. App. N., 3; 1 Hamilton's Works 117, 121.

We do not dispute the power of Congress to proceed to wind up the tribal affairs after statehood, and whether or not Congress after statehood could continue *existing* restrictions against alienation is not a question now for determination.

It might be held that restricted lands continued under the supervsion of Congress until the restrictions expired, although the owner is a citizen of the United States and a state. But, unrestricted lands became subject to the exclusive jurisdiction of the state, and although our national and state governments are dual in their relationship, neither can exercise the sovereignty of the other, and neither can the sovereign power of one occupy one and the same scope with the other. Each is exclusive of the other.

Thus, as said by Mr. Justice BREWER, *In re. Heff*, 197 U. S. 505:

> "In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government."

Further, Mr. Justice BREWER said:

"If it be true that there can be no divided authority over the property of the Indian, *a fortiori* must it be true as to his political status and rights.

Subjection to both state and national law in the same matter might often be impossible."

The above remarks of Mr. Justice BREWER were inspired by the statement of this court in *Blue Jacket* v. *Johnson County*, 5 Wall. 737, wherein the court said:

"If the tribal organization of the Shawnees is *preserved intact*, and recognized by the political department of the government as existing, then they are a people distinct from others, capable of making treaties, *separated from the jurisdiction of Kansas*, and to be governed exclusively by the Government of the Union. If under the control of Congress, from necessity there can be *no divided authority*."

Further, Mr. Justice BREWER said:

"But the logic of this argument implies that the United States *can never release* itself from the obligation of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the state may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood

in his veins, he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

While the state is not a party to this suit, and while a person not injured by a law cannot question its constitutionality, yet, it is permissible for us to consider the consequences of this act with a view to determining not only its constitutionality, generally speaking, but also for the purpose of ascertaining whether or not Congress had abandoned its jurisdiction over unrestricted lands. All unrestricted lands of Creeks, mixed-bloods, including those of three quarter or more Indian blood became subject to state taxation immediately upon the admission of the state. Congress had permitted the restrictions to expire before statehood, and was aware at the time the Enabling Act was passed, and also the Act of April 26, 1906, entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes," that the restrictions on the surplus lands of all three-quarter-blood Creeks, and all other mixed-blood Creeks, would be removed on August 8, 1907, under the terms of section 16 of the Supplemental Creek Agreement.

This is conclusive evidence, in the light of the provisions of the statehood bill, that Congress aban-

doned its jurisdiction over unrestricted lands, and recognizing the very fact of abandonment is the very reason why Congress inserted in section 1 of the Act of May 27, 1908, the disclaimer of any intention to impose restrictions removed from land by or under any law prior thereto. The reasoning of the Court of Appeals in its opinion in this case is sound. The court said:

> "As soon as the title, both legal and equitable, to the land in question became vested in Moses Wiley it was subject to taxation by the state and county authorities, and Moses Wiley had full dominion over the same, notwithstanding in many respects the Government still retained a guardianship over him.
>
> Suppose, for instance, Moses Wiley had received title to land by inheritance from a white ancestor. Could it be said that because of the guardianship of the United States over him Congress could deprive him of his full property rights in and to such land, and also withdraw the same from state or municipal taxation? It seems clear to us that it could not, and if not, we fail to see upon what principle it can be said it can draw to itself control over the alienation of land the title of which, both legal and equitable, it has conveyed to the Indian."

See the same doctrine sustained by this court in *Pennock* v. *County Commissioners*, 103 U. S. 44, 26 L. ed. 367.

But it is insisted by counsel for the Government, that the State of Oklahoma entered into a solemn compact with the Federal Government by

the terms of which it agreed for the United States to reserve to itself and exercise over the Indian citizens of the state the authority of a guardian over their persons and property. This argument is based on the Enabling Act and the Constitution of the state. Reference is made to the first section of the Enabling Act, which is as follows:

> "That nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

Reference is also made to the third paragraph of section 3, of the Enabling Act, which is as follows:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within said limits owned or held by any Indian, tribe or nation, and that until the title to such public lands shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States and residing within the limits of said state shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the state

on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

Section 3 of the Constitution of Oklahoma is as follows:

> "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public land lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

The constitutional convention of the proposed State of Oklahoma, on the 22nd day of April, 1907, passed an ordinance as follows:

> "*Be It Ordained,* By the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocably accept the terms and conditions of the Act of Congress of the United States entitled 'An Act to Enable the People of Oklahoma and the Indian Territory to Form a Constitution and State Government, and Be Admitted Into the Union on an Equal Footing With the Original States, etc., etc.,' approved June 16, 1906."

The reservation in the Enabling Act of the authority of the Federal Government to make any law or legislation respecting such Indians, their lands, property or other rights, etc., it would have been

competent to make if the act had never been passed, cannot be stretched to cover the entire field occupied by Congress prior to statehood. Prior to statehood Congress had authority to legislate on the domestic affairs of the Indians, to regulate marriage and divorce, pass no fence laws, dog laws, herd laws, and make such laws apply to everybody throughout the Indian Territory. This reservation of authority in Congress was intended to preserve the power of Congress to wind up the tribal affairs and continue supervision over the restricted lands of the tribal citizens. *If it meant anything else, more or greater, then there has been no statehood for the Five Tribes, and the citizens of the Five Tribes are not entitled to the privileges and immunities and civil rights of other citizens of the state. If they are under the exclusive jurisdiction of the Federal Government with respect to their person and all their property rights, as they undoubtedly were prior to statehood the state has no jurisdiction over them.*

The doctrine announced by Mr. Justice Brewer *In re. Heff* that, "in this Republic there is a dual system of government, national and state," and "each within its own domain is supreme," has never been denied.

The jurisdiction to wind up the tribal affairs, administer the tribal property, and regulate the disposition of restricted lands may exist in the Federal Government, and jurisdiction over unrestricted lands, domestic and private affairs of the Indian citi-

zens, may likewise exist in the State. The State is supreme in its domain, and the Federal Government supreme in its sphere. But with the jurisdiction of the State once attached, Congress cannot destroy it, nor draw to itself a jurisdiction it surrendered or abandoned to the State.

Under the provisions of the Oklahoma Enabling Act no one would have the hardihood to contend that Congress now has jurisdiction to enact legislation pertaining to the property affairs of the Indian citizens of the State—we refer to property they acquire by purchase, gift or inheritance.

The many liquor decisions handed down by this court pertaining to Indians base the authority of Congress to act upon the provisions of the Constitution authorizing Congress to regulate commerce between the various states, foreign nations and the Indian Tribes, and also upon covenants made between the United States and the Indian Tribes whereby the Federal Government guarantees to suppress the liquor traffic in the Indian country, etc. These decisions throw no light upon the question here discussed.

Thus, in *Dick* v. *United States*, 208 U. S. 353, the court referred to the power of Congress to regulate commerce with Indian Tribes, and in that case the power of the Federal Government to maintain prosecutions for introducing liquor in the Nez Perce Indian Reservation in the State of Idaho was based

upon the special agreement made between the United States and the Indians, and the Constitution authorizing Congress to regulate commerce with the Indian Tribes. *In re. Celestine*, 215 U. S. 278; *U. S.* v. *Sutton*, 215 U. S. 291, and *Hallenwell* v. *U. S.*, 221 U. S. 320, are not applicable and need no comment.

Likewise, in *United States* v. *Sandoval*, 231 U. S. 28, this court sustained the authority of the Federal Government to prohibit the introduction of liquor into the Indian country, to-wit: the Santa Clara pueblo, not on the ground that the Enabling Act admitting New Mexico as a state reserved to Congress that authority, but on the ground that Congress had under the Constitution power to regulate commerce with the Indian Tribes, and the only question there open for consideration was whether or not the Pueblo Indians were at the time New Mexico was admitted as a state an Indian Tribe subject to Federal jurisdiction as such. The court found that the Pueblo Indians owned their lands in common, that is, communal.

This court recognized in *United States* v. *Sandoval, supra*, as well as in *Coyle* v. *Oklahoma*, 221 U. S. 559, that the powers of the Federal Government could not be enlarged, or those of the State surrendered, by any compact or covenant entered into between the United States and a State. It is too clear for argument that a state and the Federal Government cannot enter into a compact or any agreement

whereby the Constitution of the United States is amended so as to confer greater power upon the Federal Government over the citizens of one state than another. Neither can one state through any compact with the Federal Government surrender its sovereignty reserved to it under the Federal Constitution.

In *United States* v. *Sandoval*, Mr. Justice VAN DEVANTER said:

> "As was said by this court in *Coyle* v. *Oklahoma*, 221 U. S. 559, 574: 'It may well happen that Congress should embrace in an enactment introducing a new state into the Union, legislation intended as a regulation of *commerce* among the states, or *with Indian* tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the *sphere of the plain power of Congress*. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.' To the same effect are *Pollard* v. *Hagan*, 3 How. 212, 224-225, 229; *Ex parte Webb*, 225 U. S. 663, 683, 690-691." (Italics ours.)

The reservation of federal power in the Enabling Act amounts to nothing more than notice

that the Federal Government shall have the right to exercise over Indian matters in Oklahoma the *same jurisdiction* it has in all other states over the same subject.

We, therefore, contend that the act contravenes the following amendments to the Federal Constitution:

First. Article 9: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;"

Second. Article 10: "The power not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Third. Article 5 providing that "No person shall be deprived of life, liberty or of property without due process of law."

In *Powell* v. *Penn.*, 127 U. S. 678, 32 L. ed. 253, Mr. Justice HARLAN said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment."

That the privilege of acquiring, holding and selling property embraces the right to make all

proper contracts in relation thereto is well settled by the decisions of this court.

—*Allgeyer* v. *State*, 165 U. S. 580, 41 L. ed. 832;

Lochner v. *New York*, 198 U. S. 45, 49 L. ed. 937.

In *Civil Rights Cases*, 109 U. S. 22, the court said:

> "The fundamental rights which are of the essence of civil freedom include the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property."

And the court further stated that "the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."

The question as to whether or not Congress *before* statehood could impose restrictions against the alienation of land then free from restraint has never been decided. Throughout the relationship between the Federal Government and the Indian Tribes for more than one hundred and twenty-five years Congress never attempted to exercise such power. As we view it, whether Congress had such power in the absence of statehood is not the question in this case. The question here is: Has Congress the authority to prohibit a full fledged citizen of the State of Oklahoma from alienating lands to which he has a fee simple title, and which land was free from restrictions against alienation at the time

the state was admitted, and which land became subject to the jurisdiction of the state and to all burdens imposed upon the property of other citizens of the state? This situation comes nearer falling within the doctrine *In re. Heff*, 197 U. S. 504, than any other case arising since the decision in that case.

In *Tiger* v. *Western Investment Company*, so much relied upon by the Government, the court concluded "that in the present case when the Act of 1906 was passed, the Congress had not *released* its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to *continue* to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine *when* its guardianship shall cease, and while it still continues it has the right to *vary its restrictions* upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

There is no intimation in the *Tiger* case, or any other case, that Congress claims or possesses the power to prohibit a full fledged citizen of a state from alienating his land free from restrictions at the time the state was admitted, although such citizen may be of Indian blood. Complete state citizenship having been granted the citizens of the Five Tribes, the jurisdiction of the Federal Government

is excluded over their alienable lands. And what jurisdiction Congress may now have to continue existing restrictions, or, as said in the *Tiger* case, "vary its restrictions," or legislate about Indian tribal affairs, is not involved in this case.

In *Choate* v. *Trapp*, 224 U. S. 677, this court said:

> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *In re. Heff*, 197 U. S. 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307; *Smith* v. *Goodell*, 20 Johns (N. Y.) 188; *Lowery* v. *Weaver*, 4 McLean 82; *Whirlwind* v. *Von der Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Ark. 485, 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, and subject to the guardianship of the United States as to his political and personal statue. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 175 U. S. 1. There it appeared that an Indian chief owned in fee land which fronted on a stream. The chief died, and, in 1891, his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894, he again let the same property to Jones for twenty years. In that year, the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the

latter would increase the rental. This he did, and, with the assent of the Indian and the Secretary of the Interior, a lease was made to Jones. In the litigation which followed, Meehan relied on the first contract made in the exercise of the Indian's right of private ownership. Jones relied on that made under congressional authority, and although the Indian was a member of the tribe, and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself."

Conclusion

We respectfully claim that the act does not apply to three-quarter-blood Creeks, but if so, it is void and unconstitutional.

Respectfully submitted,

GEO. S. RAMSEY,

EDGAR A. DE MEULES,

Counsel for Appellees.

APPENDIX.

ACT OF CONGRESS

of May 27, 1908.

(35 Stat. L. 312.)

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That *from and after sixty days from the date of this Act the status of the lands* allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not

be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, *except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act.* No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

* * * * * * *

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes; *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the al-

lottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

SUPPLEMENTAL CREEK TREATY.

APPROVED BY ACT OF CONGRESS JUNE 30, 1902, AND RATIFIED BY THE CREEK NATION JULY 26, 1902; EFFECTIVE BY PROCLAMATION OF THE PRESIDENT OF THE UNITED STATES AUGUST 8, 1902.

(32 Stat. L. 500.)

16. Lands allotted to citizens shall not in any manner whatever or any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the

deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

CHEROKEE AGREEMENT.

APPROVED BY ACT OF CONGRESS JULY 1, 1902.
RATIFIED BY THE CHEROKEE NATION AUGUST 7, 1902.
(32 Stat. L. 716.)

Sec. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value

to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

Sec. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SUPPLEMENTAL CHOCTAW AND CHICKASAW TREATY.

APPROVED BY ACT OF CONGRESS JULY 1, 1902.

RATIFIED BY THE CHOCTAW AND CHICKASAW NATIONS, AND BECAME EFFECTIVE SEPTEMBER 25, 1902.

(32 Stat. L. 641.)

Sec. 13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

Sec. 14. When allotments as herein provided have been made to all citizens and freedmen, the

residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

Sec. 15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

Sec. 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 251.

THE UNITED STATES, APPELLANT,

vs.

H. U. BARTLETT AND THEO. G. LASHLEY, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLEES.

GEO. S. RAMSEY,
EDGAR A. DE MEULES,
Attorneys for Appellees.

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May it please the court:

It may be important to analyze a few of the Indian decisions of this court handed down during the last few years. We asserted in our original brief that the liquor and criminal cases decided by this court throw little light on the point involved in this case. For instance, in United States *vs.* Celestine, 215 U. S., 278, the indictment charged Celestine,

In

an Indian, with the crime of murdering another Indian "within the limits of the Tulalip Indian Reservation." Under section 5339 of the Revised Statutes the United States long ago provided for the punishment of the crime of murder committed "within the exclusive jurisdiction of the United States" and "within the limits of any Indian reservation," although the same be within the limits of a State. In the Celestine case the Indians held trust patents to the lands within the reservation, and the President of the United States was empowered to cancel the patent of any Indian when he ceased to occupy and till the land, etc. The title to the land upon which the crime was committed was still in the United States, and this court held that under clause 2, section 3, article 4, of the Constitution, giving Congress the power to make all rules and regulations respecting the territory and property of the United States, the United States still had exclusive jurisdiction over the territory in which the crime was committed. Distinguishing the Heff case, 197 U. S., 488, the court said that the Tulalip Indians were not in the class in which Heff fell, in that Heff came under the provision of the first sentence of section 6 of the act of 1887, declaring "that, upon the completion of allotments and the patenting of the lands to the allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," etc. In other words, the court pointed out that Heff had become subject to the civil and criminal laws of the State of Kansas. The Heff case is therefore easily distinguished from the Celestine case. Likewise, in U. S. *vs.* Sutton, 215 U. S., 291, a liquor case, the allotments were held in trust by the United States, and the alienation of the land was restricted and the title, or rather promised title, of the Indian was subject to defeasance.

The indictment was under the act of January 30, 1897 (29 St., 506), which provides:

> "That * * * any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the *Indian Country*, which term shall include any Indian allotment while the title to the same shall be *held in trust* by the Government, or while the same *shall* remain *inalienable* by the allottee without the consent of the United States, shall be punished," etc.

The jurisdiction of the Federal Government to maintain the prosecution in the Sutton case is clear on account of the title to the allotted lands being retained by the United States, held in trust, and the possessory interest of the Indian inalienable.

In Hallowell *vs.* United States, 221 U. S., 317, the indictment was for introducing liquor on a restricted Omaha Indian allotment, title to which was still in the United States. The indictment was under the act of January 30, 1897. Whether the Indians were citizens of the State of Nebraska and subject to the civil and criminal laws of that State was not material. This court clearly explained and stated the basis upon which the jurisdiction of the Federal Government still existed.

This court said:

> "In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample."

Further the court said:

> "*While for many purposes the jurisdiction of the State of Nebraska had attached*, and the Indian as a citizen was entitled to the rights, privileges, and immunities of *citizenship, still* the United States within

> its *own* territory and in the interest of the Indian had jurisdiction to pass laws protecting *such* Indians from the evil results of intoxicating liquors as was done in the act of January 30, 1897, which made it an offense to introduce liquors into such Indian country, including an Indian allotment."

We undertook to show in our original brief that all the members of the five civilized tribes without respect to their degree of Indian blood became citizens of the State of Oklahoma and subject to all of its civil and criminal laws when the State was admitted on November 16, 1907, and that the surplus lands of three-quarter blood Creek Indians, being free from restraint against alienation at the time, became subject to the jurisdiction of the State, and that the United States lost all jurisdiction to legislate in regard to unrestricted lands. On page 57 of our original brief we quote section 2 of the Oklahoma Enabling Act which expressly provided that all members of any Indian nation or tribe in said Indian Territory were authorized to vote for and choose delegates to form a constitutional convention, and that they were eligible to serve as delegates to the convention. We have not found this provision in the Enabling Act authorizing the organization of any of the other new States. This provision was not in that part of the act of June 16, 1906 (the Oklahoma Enabling Act), also providing for the organization and admission of New Mexico and Arizona as one State, though there were a great many Indians in those two Territories. No such provision will be found in the Arizona and New Mexico Enabling Act passed in June, 1910. While we have not examined the enabling acts of all the new States in the West, we have examined a good many of them and there is no such provision in any of those we have examined. We have examined the acts authorizing the admission of North Dakota, South Dakota, Montana, and Washington (25 St. L., 676), Colorado (18 St. L., 474), Utah (28 St. L., 107), and Kansas. The act approved February 27, 1889, providing for the organization

of the States of North and South Dakota, Montana, and Washington provided that only those persons were eligible to vote for delegates to the constitutional conventions who were qualified voters for representatives in the Territory Legislatures. Only those persons competent under territorial laws for representatives in the territorial legislature were made competent and qualified for delegates to the constitutional convention. The act organizing the Dakota Territory (12 St. L., 239) provided that every white male inhabitant over twenty-one years of age should be a competent voter if a citizen of the United States and thereafter the qualification of voters could be fixed by the territorial legislature with this proviso:

> "That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such and shall have taken an oath to support the Constitution of the United States."

Congress likewise fixed the qualification of voters in the act organizing the Territory of Washington (10 St. L., 172). Thus it will be seen that Indians, not then being citizens of the United States, were not qualified voters in either the Territories mentioned or for delegates to the constitutional convention or for State officers, etc. The act providing for the organization of North and South Dakota, Montana, and Washington as separate States contained the following provision not found in the Oklahoma Enabling Act, to wit:

"The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to *Indians not taxed*, and not be repugnant to the Constitution of the United States and Declaration of Independence," etc.

Further, the people inhabiting said proposed States etc., "disclaim all *right and title* to the unappropriated public lands," etc., "and to all lands lying within said limits owned

or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same (which clearly means public lands and also lands of Indians and Indian tribes) shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe."

A similar provision is in the Colorado Enabling Act (18 St. L., 474); also Utah (28 St. L., 107).

With respect to Kansas, we cite General Statutes of Kansas of 1868. In the Organic Act organizing the Territory of Kansas (St. 1868, 25) it is expressly provided "that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the U. S. and such Indians, or to *include* any Territory which by treaty with any Indian tribe or not, without the consent of said tribe, to be included in the territorial limits or jurisdiction of any State or Territory; but all such territory shall be *excepted out of the boundaries*, and constitute *no part of the Territory of Kansas*, until said tribe shall signify their assent to the President of the United States to be included within the said Territory of Kansas, or to affect the authority of the Government of the United States to make any regulation

respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make, if this act had never been passed."

Only "white male inhabitants above the age of 21 years were qualified voters," and although the legislature of the Territory was given power to thereafter fix the qualifications of voters and those to hold office, yet the legislature was denied the power to make any one other than a citizen of the United States a qualified voter or competent to hold office, and Indians, not then being citizens of the United States, were therefore not voters or qualified to hold office.

In the act of Congress approved January 29, 1861 (Kan. St. 1868, p. 66), admitting Kansas as a State, section 7 thereof, we find the same language above quoted from the Organic Act.

The act admitting Kansas expressly excluded the Indians and their lands from the jurisdiction of the State, and so far as the State government of Kansas was concerned the Indians and their lands, although inside the State boundary lines, were, nevertheless, a foreign people and foreign territory.

The Heff case arose in Kansas, and the Indians' emancipation was under the first sentence of section 6 of the act of 1887. The Indians living in the territorial limits of the Territory of Kansas and afterwards in the State of Kansas were not entitled to participate in the government of the Territory or the organization of the State. We have examined several other enabling acts, and in none of them is there any provision expressly making the Indians qualified voters and eligible to serve as delegates to the constitutional convention.

The Five Civilized Tribes have always been treated more liberally by the Federal Government than any other tribes. Their lands were allotted in fee, and the Government did not reserve any proprietary interest. *The members of the Five Civilized Tribes were just as much permitted to organ-*

ize a State as any of the other inhabitants of the Indian Territory and Oklahoma Territory. So far as their civil and political rights are concerned, they were recognized as possessing all the qualifications necessary to organize a State. In no other organic act or enabling act has the Indian been so treated and considered.

The point we are trying to impress upon the court is that the Federal Government never made any distinction in the inhabitants and people of the Indian Territory and Oklahoma Territory. The *people* of those two Territories, irrespective of race, were authorized to organize a State, and we assert that Congress never for one moment considered, when it passed the Enabling Act, that the United States had any further guardianship over the members of the Five Tribes except in so far as necessary to wind up the tribal affairs. Their tribal laws had long before been abolished. Their courts were abolished long prior to statehood. Their chiefs or governors had no authority further than to sign patents and preside over council meetings. The Creek council had no jurisdiction to pass any law at the time Oklahoma was admitted as a State except to appropriate money, and such act of the council would have no validity until approved by the President of the United States.

The tribes had their courts. The Creek Nation had district courts and one Supreme Court composed of five judges, and the written opinions of the Supreme Court of the Creek Nation compare very favorably with some of the opinions of the white man's courts.

All these were abolished long before statehood, and Congress took charge of all the tribal affairs and legislated directly. In other words, the Indian Territory had no territorial government in the sense that Oklahoma Territory and Washington Territory, etc., had prior to statehood. So we say when statehood came it was statehood for the Indians, and it takes a great deal of laborious stretching to get any guardianship whatever over them further than the administration of their tribal affairs. But they are citizens

of the State and subject to all its civil and criminal laws as much so as in the Heff case, and in fact more so. The State's jurisdiction over unrestricted land and over the citizens of the tribes excludes the jurisdiction of the Federal Government. Congress clearly surrendered and abandoned its jurisdiction over unrestricted lands and over the persons and individual members of the Five Tribes. The power of Congress to prohibit the introduction of intoxicating liquors into the Five Tribes is not based on personal guardianship over the members and citizens.

In contemplation of law, both State and Federal, the members of the Five Tribes,individually, are no more Indians than the white people. Their race has nothing to do with their civil and political status, and Congress has no more jurisdiction to legislate about their unrestricted lands than it has to regulate the procedure for the exchange of a cow for a horse in a trade between two citizens of New York.

Respectfully submitted,

GEO. S. RAMSEY,
EDGAR A. DE MEULES,

[26712]

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UNITED STATES *v.* BARTLETT.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 251. Argued October 22, 1914.—Decided November 16, 1914.

The act of May 27, 1908, c. 199, 35 Stat. 312, extending to April 26, 1931, the period of restriction upon the alienation of certain Indian allotments, contained an excepting clause declaring that "nothing herein shall be construed as imposing restrictions removed by or under any prior law;" *held* that restrictions which had been terminated by lapse of time as contemplated by the law imposing them were "removed from the land by or under" a prior law within the meaning of the excepting clause.

203 Fed. Rep. 410, affirmed.

THE facts, which involve the construction of the act of May 27, 1908, extending restrictions on alienation of Indian allotments, are stated in the opinion.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States:

By the act of May 27, 1908, Congress meant to provide against the alienation, prior to April 26, 1931, of any allotment then held by any member of any of the Five Civilized Tribes of full or three-quarters Indian blood,

excepting only such allotments as had been or as might thereafter be specifically relieved of restrictions, by the action of the Secretary of the Interior or of Congress itself.

The act of May 27, 1908, should be construed, *in pari materia* with other acts which will be cited, as the expression of a definite policy to abolish the divergencies and remedy the defects of the various agreements under which the allotments in the Five Civilized Tribes had been made, by classifying all the allotments, irrespective of tribe, according to the degree of the presumed natural competency of the allottees, standardized arbitrarily in accordance with their respective proportions of Indian blood; and by relieving the restraints altogether as to those thus classified as competent, and by forbidding conveyances by those thus classified as incompetent prior to April 26, 1931.

Both the spirit and the letter of the act of May 27, 1908, demand that all the lands of the three-quarter blood Indians be held restricted until April 26, 1931, irrespective of the prior restrictions.

That part of the first section of the act of May 27, 1908, which declares that the act shall not be construed "to impose restrictions removed from land by or under any law prior to the passage of this act," refers only to those cases in which restrictions have been removed by the direct action of Congress or by the Secretary of the Interior from particular allotments.

The opposite construction would render this clause repugnant to the plain terms classifying three-quarter bloods as incompetent in respect of all of their land and to the fundamental purpose of the statute to protect the incompetent Indians.

The clause may readily be construed in avoidance of this result and in harmony with the statute as a whole by confining it to the special cases above mentioned.

If doubt exists, this construction should be adopted as the more beneficial to the Indians.

Congress had power to place a new restriction upon the land in controversy, as was done by the act of May 27, 1908. *Tiger* v. *Western Investment Co.*, 221 U. S. 301.

The imposition of restrictions upon the alienation of Indian allotments is but a mode of exercising the power of guardianship still residing in the United States respecting the Indians. Until the guardianship shall have been renounced, Congress may modify its plans and correct its mistakes. If it has given the Indians a liberty too large for their own good, Congress may curtail it. The renewal of an expired restriction stands upon the same ground as the extension of one which has still some time to run. The power to extend existing restrictions and the power to impose new restrictions where none exist—one and the same in quality and purpose—are derived from the guardianship of the Federal Government over the Indians.

The power to reimpose restrictions is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of any vested right of property. But the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held, and the imposition of a restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property.

The power to protect the property of an Indian ward, being a power of the General Government, is not to be diminished or impaired in its full usefulness by the circumstance that the property has been tentatively subjected to the taxing power of a State, but the right of the State of Oklahoma to continue taxing the land in controversy is not involved, and could not constitute a defense in the present case.

The power to reimpose restrictions is consistent with

the full protection of all rights in the land which may have become vested in third persons while the allottee was free to convey.

In support of these contentions, see *Bartlett* v. *United States*, 203 Fed. Rep. 410; *Bowling* v. *United States*, 233 U. S. 528; *Choate* v. *Trapp*, 224 U. S. 665; *Deming Invest. Co.* v. *United States*, 224 U. S. 473; *Franklin* v. *Lynch*, 233 U. S. 269; *Goat* v. *United States*, 224 U. S. 458; *Hallowell* v. *United States*, 221 U. S. 317; *Heckman* v. *United States*, 224 U. S. 413; *Matter of Heff*, 197 U. S. 488; *Jones* v. *Meehan*, 175 U. S. 1; *In re Lands of Five Civilized Tribes*, 199 Fed. Rep. 811; *Mullen* v. *United States*, 224 U. S. 448; *Perrin* v. *United States*, 232 U. S. 478; *Starr* v. *Long Jim*, 227 U. S. 613; *Tiger* v. *Western Invest. Co.*, 221 U. S. 301; *United States* v. *Allen*, 179 Fed. Rep. 13; *United States* v. *Celestine*, 215 U. S. 290; *United States* v. *Kagama*, 118 U. S. 375; *United States* v. *Pelican*, 232 U. S. 442; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Shock*, 187 Fed. Rep. 870; *Ex parte Webb*, 225 U. S. 663; see also Act of February 28, 1887, 24 Stat. 388; Act of July 1, 1898, 30 Stat. 567; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500; Act of July 1, 1902, 32 Stat. 641; Act of July 1, 1902, 32 Stat. 716; Act of March 3, 1903, 32 Stat. 1008; Act of April 21, 1904, 33 Stat. 189; Act of April 26, 1906, 34 Stat. 137; Act of May 8, 1906, 34 Stat. 182; Act of June 21, 1906, 34 Stat. 345; Act of May 27, 1908, 35 Stat. 312; Congressional Record, 60th Cong., 1st sess., vol. 42, pt. 7, p. 6781; Report of Secretary of the Interior, 1904, pt. 2, pp. 37 to 41.

Mr. George S. Ramsey, with whom *Mr. Edgar A. de Meules* was on the brief, for appellees:

The act of May 27, 1908, disclaimed intention to again restrict sale of any land from which restrictions had been removed.

As the constitutionality of the act of May 27, 1908, is in grave doubt, it should be construed so as to avoid constitutional question.

The title of the act is to remove restrictions, and in case of doubt as to construction the title of an act can be considered.

If the act is intended to declare all three-quarter bloods incompetent and to restrict the sale of any land then free, there was no reason for its operation to be suspended for sixty days.

The clause pertaining to restrictions on mixed-bloods of three-quarter or more Indian blood had a wide field for operation, excluding the Creek Nation.

The restrictions on Moses Wiley and all mixed-blood Creeks, irrespective of fractional quantum of Indian blood, were removed under a law, to-wit: § 16 of act of Congress approving Supplemental Creek Agreement.

If the construction of the act is in doubt—then the construction insisted on by the Government should be rejected, because it is unjust and infringes upon the State's right to tax the lands after the act, though they were subject to state taxation before.

If the act put restrictions on land then free it is unconstitutional. The Government abandoned its guardianship over unrestricted lands.

Personally, the Indians were granted statehood by the Oklahoma Enabling Act, and with respect to their persons and unrestricted lands and all other property are on an equality, civilly and politically, with all other citizens of the State, and have as citizens of the United States and Oklahoma the same exemptions from Federal control, enjoyed by citizens of any other State.

When Congress once permitted lands to become free from restrictions, the Indian being a full fledged citizen of the State, the guardianship over all the unrestricted property of that Indian ceased, whether that property

was acquired by gift, purchase, inheritance, or allotment—when once free, always free.

Congress having permitted the State's power to tax to vest, is conclusive evidence that Congress abandoned its guardianship over that land, and there is no power in the Federal Government to withdraw it from full dominion of the State. In support of these contentions, see act of May 27, 1908, 35 Stat. 312; Supplemental Creek Treaty, 32 Stat. 500; Cherokee Agreement, 32 Stat. 716; Supplemental Choctaw and Chickasaw Treaty, 32 Stat. 641. And see also *Allen* v. *Oliver*, 31 Oklahoma, 356; *Allgeyer* v. *State*, 165 U. S. 580; *Bahuand* v. *Biz*, 105 Fed. Rep. 485; *Barrett* v. *Kelley*, 31 Texas, 476; Black. Interp. of Law, p. 205; *Blanck* v. *Pausch*, 113 Illinois, 60; *Blue Jacket* v. *Commonwealth*, 5 Wall. 737; *Bowles* v. *Haberman*, 95 N. Y. 246; *Boyd* v. *Nebraska*, 143 U. S. 135; *In re Celestine*, 215 U. S. 278; *Civil Rights Cases*, 109 U. S. 22; *Choate* v. *Trapp*, 224 U. S. 665; *Collins* v. *Hadley*, 78 N. E. Rep. 353; *Cryer* v. *Andrews*, 11 Texas, 170; *Dick* v. *United States*, 208 U. S. 353; *Elks* v. *Wilkins*, 112 U. S. 101; Endlich, Stat. Interp., §§ 53 and 370; *Fellows* v. *Denniston*, 5 Wall. 761; *Gritts* v. *Fisher*, 224 U. S. 640; *In re Heff*, 197 U. S. 505; *Lochner* v. *New York*, 198 U. S. 45; *Lone Wolf* v. *Hitchcock*, 187 U. S. 565; *Minneapolis* v. *Beum*, 56 Fed. Rep. 576; *Mullen* v. *United States*, 224 U. S. 448; *O'Conner* v. *State*, 71 S. W. Rep. 409; *Osterman* v. *Baldwin*, 6 Wall. 116; *Pennock* v. *County Com.*, 103 U. S. 44; *People* v. *Barrett*, 67 N. E. Rep. 742; *People* v. *Washington*, 36 California, 658; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Redbird* v. *United States*, 203 U. S. 76; *Risley* v. *Village*, 64 Fed. Rep. 457; *Sheehan* v. *L. & R. Ry. Co.*, 101 S. W. Rep. 380; *Slaughter-House Cases*, 16 Wall. 73; *Smythe* v. *Fish*, 23 Wall. 374; *Stoddard* v. *Chambers*, 2 How. 284; 2 Sutherland Stat. Const., § 358; *Thomas* v. *Gay*, 169 U. S. 271; *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; *Truskett* v. *Closser*, 198 Fed. Rep. 835; *United States* v.

Fisher, 2 Cranch, 358; *United States* v. *Hall*, 171 Fed. Rep. 214; *United States* v. *Hallowell*, 221 U. S. 320; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Palmer*, 3 Wheat. 610; *United States* v. *Rickert*, 188 U. S. 433; *United States* v. *Sandoval*, 231 U. S. 28; *United States* v. *Shock*, 187 Fed. Rep. 871; *United States* v. *Sutton*, 215 U. S. 291; *United States* v. *Bennett*, 232 U. S. 303; *Yellow Beaver* v. *Board of Com.*, 5 Wall. 757.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to cancel two deeds of land allotted to an enrolled citizen of the Creek tribe of Indians. The land is what is known as surplus, as distinguished from homestead, land, and the allottee is of three-fourths Indian blood. The allotment was made under the act of June 30, 1902, 32 Stat. 500, c. 1323, known as the Supplemental Creek Agreement, which provided in § 16 that the land should be inalienable by the allottee or his heirs for a period of five years, expiring as it is said in the briefs, August 8, 1907. In 1912 the allottee deeded the land to Bartlett, one of the appellees, and shortly thereafter Bartlett deeded it to Lashley, the other appellee. These are the deeds sought to be cancelled and the right to that relief is rested upon a provision in § 1 of the act of May 27, 1908, 35 Stat. 312, c. 199, declaring that "all allotted lands of . . . enrolled mixed-bloods of three-quarters or more Indian blood . . . shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one," etc. As the original restriction upon alienation expired several months before the passage of the act of 1908, and also long before the deed from the allottee to Bartlett, the important question in the case is whether Congress intended by the act of 1908 to re-

impose and extend that restriction in respect of allotments which theretofore had been entirely freed from it through the expiration of the period prescribed for its existence. The District Court, adhering to an opinion given in another case (187 Fed. Rep. 870, 873), answered the question in the affirmative, and the Circuit Court of Appeals, concluding that the answer should be the other way, directed that the bill be dismissed. 203 Fed. Rep. 410.

If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to embrace all allotments of the class described whether then subject to the original restriction or theretofore freed from it. But that language is not to be taken literally, for it is followed by a declaration that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act." That this declaration is intended to qualify or restrain what precedes it is conceded, but to what extent is the subject of opposing contentions.

Under prior legislation the lands of the Five Civilized Tribes, including those of the Creeks, had been allotted in severalty, all subject to restrictions upon alienation which were to be terminated by the lapse of varying periods of time. As to some of the lands these periods had expired, thereby lifting the restrictions. In some instances Congress had abrogated the restrictions in advance of the time fixed for their termination, and in still other instances they had been cancelled by the Secretary of the Interior in the exercise of authority conferred by law. But as to most of the lands the restrictions were still in force. It was in this situation that Congress, by the act of 1908, extended or enlarged the period of restriction in respect of "all allotted lands of . . . enrolled mixed-bloods of three-quarters or more Indian blood" and accompanied its action with an explanation that it was not intended to

impose restrictions theretofore "removed from any land by or under any law."

The real controversy is over the meaning of the word "removed." It is not questioned that it embraces the action of Congress and of the Secretary of the Interior in abrogating or cancelling restrictions in advance of the time fixed for their expiration, but it is insisted that it does not embrace their termination by the lapse of time. In short, the contention is that the word is used in a sense which comprehends only an affirmative act, such as a rescission or revocation while the statutory period was still running. Although having support in some definitions of the word, the contention is, in our opinion, untenable, for other parts of the same act, as also other acts dealing with the same subject, show that the word is employed in this legislation in a broad sense plainly including a termination of the restrictions through the expiration of the prescribed period. This is illustrated in §§ 4 and 5 of the act of 1908 and § 19 of the act of April 26, 1906, c. 1876, 34 Stat. 137, 144, and is recognized in *Choate* v. *Trapp*, 224 U. S. 665, 673, where, in dealing with some of these allotments, it was said that "restrictions on alienation were removed by lapse of time."

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.